Supreme Court, U.S.
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No. 09-____

In The

Supreme Court of the United States

AMBRACO, INC. and GREAT AMERICAN INSURANCE COMPANY,

Petitioners,

v.

M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, BOSSCLIP B.V., DOCKENDALE SHIPPING CO., LTD. and FAITH SHIPPING COMPANY, LTD., *in personam*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 28, 2009

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QUESTIONS PRESENTED

This matter involves an important question of public policy:

Should forum selection and jurisdiction clauses in a bill of lading be held enforceable where enforcement will allow Carriage of Goods by Sea Act (hereinafter "COGSA") 46 U.S.C. § 1301(a) [30701 (a)] and 1303 (8) [30703 (8)] common carriers to escape liability for their negligence in damaging cargo in their care, custody, and control, which would be the substantive result of enforcing the forum selection clause?

The District Court's enforcement of the forum selection and jurisdiction clauses at issue and the affirmance of that enforcement by the Court of Appeals for the Fifth Circuit violates the instructions of this Court in *VIMAR SEQUROS Y. REASEGUROS, S.A. v. M/V SKY REEFER*, 515 US 528 (1995) and effectively relieves parties of liability which would otherwise bear liability pursuant to COGSA.

RULE 14.1(b) STATEMENT

A list of all Parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

Plaintiff-Appellants and Petitioners:

Ambraco, Inc. (hereinafter "Ambraco") and Great American Insurance Company (hereinafter "Great American").

Defendants-Appellees and Respondents:

M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, Bossclip B.V. (hereinafter "Bossclip"); Dockendale Shipping Co., Ltd. (hereinafter "Dockendale"); Faith Shipping Company, Ltd. (hereinafter "Faith").

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PETITION FOR A WRIT OF CERTIORARI

Ambraco and Great American respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit dated May 28, 2009, is officially reported at 570 F.3d 233 and is reproduced at App. A, 1a. A Petition for Panel Rehearing was denied July 1, 2009 at App. D, 43a.

The Opinions and Orders of the U.S. District Court for the Eastern District of Louisiana, dated May 25, 2007 and November 7, 2007 are officially reported at 2007 WL1550960 and 2007 WL2243047 and are reproduced at App. C, 29a and App. B, 21a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 9, 2009 after Petition for Panel Rehearing was denied on July 1, 2009. This petition is timely under 28 USC § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment and denial of Petition for Panel Rehearing sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 46 U.S.C. § 1301 [30701] et. seq., "Carriage of Goods by Sea Act" (COGSA) and specifically 46 U.S.C. § 1303(8) [30703(8)]. The relevant statutory provisions are reproduced at App. E, 45a.

STATEMENT OF THE CASE

This matter arises from damage to a cargo of Baler Twine purchased by Ambraco and shipped from Brazil to New Orleans aboard the M/V CLIPPER FAITH. Bossclip, the charterer of the M/V CLIPPER FAITH, a foreign flag ship, issued a bill of lading to a shipper, CIA. SISAL DO BRASIL-COSIBRA, in Cabedelo, Brazil upon the loading of 3000 bales of Baler Twine aboard the vessel for discharge in the Port of New Orleans. Dockendale was the manager/operator of the vessel. Faith was the registered owner of the M/V CLIPPER FAITH. The vessel sailed arriving in Houston where the cargo was found to be improperly secured and fallen from its stow, especially subsequent to discharge of certain steel products in the same holds. The vessel sailed to New Orleans for discharge directly overside to barges chartered by Ambraco, who had to take delivery in the barges for further carriage to the United States Midwest. A good part of the cargo however had to be discharged directly to a New Orleans wharf for recoopering by Pacorini, the discharge stevedore for Bossclip, Dockendale and Faith. Months later the recoopered cargo was finally loaded aboard barges for carriage upriver to Ambraco, where the damages were more definitely determined.

While the M/V CLIPPER FAITH was in port, seizure was threatened by Ambraco and a protection and indemnity club put up a letter of undertaking[1] for the estimated amount of damages and promised to file a claim of owner not Bossclip. The letter of undertaking remains posted and in the possession of Ambraco's counsel.

Bossclip, Dockendale and Faith (sometimes called *in globo* "carrier respondents") filed answers admitting their relationships to the CLIPPER FAITH as charterer, operator and registered owner. Upon demand, only Faith filed a claim of owner.

Ambraco and its insurer, Great American, who in the meantime had paid Ambraco's insurance claim, filed a supplemental complaint suing Pacorini, the discharging stevedore for damage done during discharge.

Bossclip, Dockendale and Faith, through one law firm, filed a motion to dismiss alleging improper venue because of an English forum selection clause and English law clause on the reverse side of the bill of lading. Eventually, on May 24, 2007 the District Court dismissed all claims against the ship, Bossclip, Dockendale and Faith without preserving jurisdiction over any carrier respondents nor the ship *in rem*. Then, on July 11, 2007, the District Court denied Petitioners' Motion, supported by the affidavit of Mr. Mark Andrew Lloyd, maritime expert solicitor in London, to Alter/Amend Judgment and/or Motion for New Trial. The District Court merely indicated that

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[1] Appendix F, 61a.

the carrier respondents could file a similar affidavit of English counsel to the contrary of Mr. Lloyd's affidavit. They never did. The District Court dismissed the complaint against the carrier respondents and the M/V CLIPPER FAITH. The Petitioners noticed appeal from that District Court dismissal of the original carrier respondents and the ship from the litigation.

On July 18, 2007, Pacorini filed an answer to the Supplemental Complaint and a Third-party Complaint for indemnity against the dismissed original carrier respondents and a Rule 14(c) tender of Bossclip, Dockendale and Faith to Ambraco and Great American. Bossclip, Dockendale and Faith combined again to file a motion to dismiss the Third-party Complaint for the same reasons as their original motion to dismiss the original Complaint.

Ambraco and Great American filed an opposition to that second motion to dismiss urging the District Court to follow this Court's *SKY REEFER* instructions on the basis of Mr. Lloyd's affidavit that the carrier respondents would escape liability under COGSA in the High Court of Justice in London, England. Bossclip, Dockendale and Faith again failed to file a contrary affidavit to Mr. Lloyd's. The District Court dismissed the Rule 14 (c) tender to Ambraco and Great American in Pacorini's Third-Party Complaint and eventually the indemnity claim by Pacorini against the original carrier respondents. The District Court believed they were already party to the litigation and thus a third party complaint could not be filed by Pacorini. The District Court had dismissed the carrier respondents but asserted jurisdiction over the Letter of Undertaking, thus maintaining jurisdiction over the *res*. Pacorini and Petitioners appealed.

Ambraco and Great American filed a "protective claim" in the High Court of Justice in London to avoid prescription of any claim in England.

The Fifth Circuit reversed the dismissal of the Pacorini indemnity claim. This petition seeks a review of the Fifth Circuit's affirmance of the dismissal of the complaint by Petitioners against the Respondents, Bossclip, Faith and Dockendale.

Since the judgment of the U.S. Court of Appeals for the Fifth Circuit, English counsel, solicitors Winter Scott, have advised they would represent only respondent Bossclip in the English Court and accept service for Bossclip only. All respondents had been represented by one New Orleans law firm in the Eastern District of Louisiana and Fifth Circuit. Thus the owner, Faith, for whom the only security was posted in the Letter of Undertaking, is so far not represented. There is no security retained by the District Court for any judgments against Bossclip and the protection and indemnity club, who posted the Letter of Undertaking for the owner only, appears not to be defending the owner in the English Court.

REASONS FOR GRANTING THE PETITION

I. COGSA

Because this claim involves damage to cargo shipped internationally into the United States, COGSA undisputedly governs this dispute. Under COGSA, a cargo owner may recover only from a *carrier*

of the goods.[2]. A "carrier" is "the owner *or* the charterer who enters into a contract of carriage with a shipper.[3]" A "contract of carriage" is a contract covered by a bill of lading or other similar document of title according to 46 U.S.C. § 1301(b) [30701(b)]. The Fifth Circuit has expressly held that to recover under COGSA, the cargo owner must establish the vessel owner or charterer executed a contract of carriage with the cargo owner.[4]

Also, and of paramount significance in this case, 46 U.S.C. 1303(8) [(30703(8)] provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

This Court in the SKY REEFER cited that section of COGSA as of paramount significance. Under COGSA, a carrier cannot limit its liability for its own negligence

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2 *Pacific Employers Ins. Co. v. M/V GLORIA*, 767 F. 2d 229, 234 (5th Cir. 1985); See also *Associated Metals & Minerals Corp. v. SS PORTORIA*, 484 F. 2d 460, 462 (5th Cir. 1973).

3 46 U.S.C. § 1301(a)/(30701(a)

4 See *Pacific Employers* 767 F. 2d at 236-37

below the minimum statutory protections afforded to the shipper or receiver.

Notwithstanding the clear statutory language on this issue, Bossclip is nevertheless attempting to exculpate itself from liability for its own negligence through the enforcement of a forum selection clause in the bill of lading requiring suit in England and the application of English maritime law. This result is impermissible under COGSA, and while this Court stated in the *M/S Bremen*[5] decision that forum selection clauses are generally to be enforced, it has since clarified that a forum selection clause will not be enforced where enforcement will allow a carrier to escape liability. Therefore, the decision of the District Court, dismissing Bossclip from the suit and allowing Bossclip to escape its COGSA liability as a carrier, must be reversed. The same holds true regarding Dockendale. It is not, as far as we know at this time a COGSA carrier but the actual facts of its relationship to the cargo are not yet known.

II. SKY REEFER INSTRUCTION

According to this Court "the central guarantee of 3 (8) of COGSA is that the terms of a bill of lading may not relieve the carrier of the obligations or diminish the legal duties specified by the Act. The relevant question, therefore, is whether the [foreign] substantive law to be applied . . ." under a choice-of-forum or choice-of-law clause ". . . will reduce the carrier's obligations to the cargo owner below what COGSA guarantees." This Court

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[5] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)

further explained, with respect to a bill of lading: "were we persuaded that the choice-of-forum or choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as against public policy."[6]

According to the foregoing guidance of this Court, the District Court can not uphold the forum selection clause at issue if it acts as a prospective waiver of Petitioners' rights to pursue the statutory remedies under COGSA. In this instance, if the case were decided in London, the only evidence before the District Court indicated there is a strong likelihood that English courts would summarily exculpate Bossclip.[7] Bossclip is the issuer of the bill of lading and a carrier under the bill of lading according to COGSA. A dismissal as well would abandon any *in rem* action that otherwise could serve to enforce any favorable judgment against the vessel and the vessel owner as claimant. Because the English Court will only recognize Faith as the COGSA carrier, Dockendale's relationship and its responsibility will not be determined. Accordingly, Petitioners will be without a mechanism to enforce any judgment, even if granted, if the dismissal of the District Court of this action against the original carrier respondents and the *in rem* claim is upheld.

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[6] See *M/V SKY REEFER* at 539.

[7] Please see the Affidavit of Mark Andrew Lloyd, APPENDIX G, 65a

The District Court in the *M/V SKY REEFER* litigation had "retained jurisdiction over the case and 'will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed'."[8] ("A court in the United States need not recognize a judgment of the court of a foreign state if . . . the judgment itself, is repugnant to the public policy of the United States"). This Court cited *Knott v. Botany Worsted Mills*.[9]

In this case in the original dismissal by the District Court, the District Court did not retain jurisdiction over the original carrier respondents and has not retained any right to review the judgments of the English Court to which the carrier respondents seek to escape. The District Court retained jurisdiction over only the Letter of Undertaking posted for the owner of the M/V CLIPPER FAITH. Bossclip is not covered by the Letter of Undertaking.

III. - ONLY THE OWNER IS A "CARRIER" IN ENGLAND

On December 31, 2005, Bossclip B.V. Netherlands entered into a contract of carriage or bill of lading with CIA SISAL DO BRAZIL - COSIBRA to carry the bales of baler twine on the M/V CLIPPER FAITH from Cabedelo, Brazil to New

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[8] See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 at 638 (1985); cf. 1 Restatement (Third) of Foreign Relations Law of the United States § 482(2)(d) (1986).

[9] 179 U.S. 69, 21 S. Ct. 30, 45 L. Ed. 90 (1900).

Orleans. Ambraco, Inc. of Dubuque, Iowa was the consignee. None of the parties are resident in England, including the owner and operator.

The "Bossclip B.V. Netherlands" bill of lading,[10] a charterer issued bill of lading, has a Definitions section on its reverse side providing in part:

> a. "Carrier" means the carrier as stipulated on page 2 of this bill of lading, and insofar as carriage by sea is concerned the registered owner of the vessel.

The signature on the bill of lading sets forth the signatory is acting "as agents only for and on behalf of Master." The agent who signed was "Heytor Gusmao CGM &. Rep. LTDA." The bill of lading also contains a Jurisdiction section which reads:

> The Contract evidenced by this bill of lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the courts of any other country.

The affidavit of Mr. Lloyd[11] states that under these contractual terms, only Faith, a COGSA carrier, will be determined to be a carrier in the High Court of Justice in London and under the laws of England. He also states that Bossclip, a common

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[10] APPENDIX H, 83a.

[11] APPENDIX G, 65a.

carrier under COGSA, will not be a carrier and will not have any responsibility under English law. The same will hold true for Dockendale. He further states there will be no *in rem* claim in the High Court of Justice and none of the respondent carriers are subject to the jurisdiction of the English court. The lack of jurisdiction results from the fact that the carriage of the cargo had nothing to do with England or Great Britain and neither Bossclip, Dockendale nor Faith is resident in Great Britain, as stated earlier. Again, Mr. Lloyd's Affidavit was the only evidence before the District Court on this issue.

IV. CONSULTATION OF OPINIONS OF FOREIGN COUNSEL

Bossclip issued the bill of lading in question in this litigation. The bill of lading identifies in the heading "Bossclip B.V., Netherlands" as the issuer. As evidenced by the Affidavit of Mr. Lloyd, the actions of the signatory are on behalf of the vessel owner only, and not on behalf of Bossclip[12]. Based on the "carrier" definition in the small print of the bill of lading, only Faith is a carrier. It is permissible and, in this case, required by SKY REEFER instructions that the District Court consult the opinions of foreign attorneys familiar with the intricacies of maritime law in their respective countries and, in reliance thereon, construct an informed picture of how a foreign tribunal may approach an issue. Courts in this country have done so by acknowledging and relying

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[12] APPENDIX G, 65a.

on the opinions of Japanese, Chinese and English counsel to determine they could not dismiss cases because a carrier in the United States would have his liability and responsibility lessened in the foreign jurisdiction. In *Nippon Fire & Marine Ins. Co. v. M/V SPRING WAVE*,[13] the District Court relied on a Japanese attorney's affidavit submitted by plaintiff to show that the forum selection clause in the bill of lading was unreasonable because of the possibility the Japanese court would interpret clauses in the bill of lading as limiting liability in violation of COGSA. In *Majestic Electronics, Inc. v. M/V JIN HE*,[14] a District Court reached a similar finding based on the opinion of a Chinese attorney giving his opinion on the application of law by Chinese Courts.

Mr. Lloyd's similar Affidavit on English law was consulted by the Southern District of New York in an identical case. In *Central National-Gottesman, Inc. v. M/V GERTRUDE OLDENDORFF, et al*, the United States District Court for the Southern District of New York relied upon *SKY REEFER* and denied a similar Motion to Dismiss the Complaint for improper venue on the basis of Mr. Lloyd's statement of English law.[15] Thus the Court in that decision reviewing an affidavit of the same solicitor, Mr. Lloyd, refused to accept the forum selection clause argued as applicable by the defendant *OLDENDORFF* that venue was improper in that

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[13] 92 F. Supp. 2d 574 (E.D. La. 200)

[14] 1999 AMC 1700, 1701 (D. C. Cal. 1999).

[15] 204 F. Supp. 2d 675, 2002 AMC 1477 (S.D.N.Y. 2002).

district. The bill of lading in *GERTRUDE OLDENDORFF* also called for adjudication of all disputes in London. The Southern District of New York cited the *M/V SKY REEFER* decision and exercised little hesitation in condemning the agreement as against public policy." See *SKY REEFER*.[16]

Relying on Mr. Lloyd's Affidavit in that case, the Southern District of New York stated that it was "persuaded that the forum selection clause at issue here essentially operates as a perspective waiver of Gottesman's right to pursue statutory remedies under COGSA. If the case were decided in London instead of this district, there is a strong likelihood that English courts would give force to an exculpatory clause in the bill of lading, insulating parties other than the shipowner from liability, in violation of COGSA."

The defendants in *Central National-Gottesman, Inc. v. M/V GERTRUDE OLDENDORFF* argued that the fact that foreign law is less favorable to a plaintiff is insufficient grounds to allow the plaintiff to bring suit in Southern District of New York. The Court distinguished the cases relied upon by the defendants as neither decision implicated COGSA and its protections. The defendants in *GERTRUDE OLDENDORFF* relied on *Piper Aircraft Co. v. Reyno*.[17] Unlike that case, the Southern District of New York said "however, it is precisely in the

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[16] 515 U.S. at 534-35.

[17] 454 U.S. 235, 1982 AMC 214 (1981).

instance where foreign law is less favorable than COGSA that the guarantees of COGSA come into play and are given full affect". The central guarantee according to *SKY REEFER* is found in 46 USC 1303 (8) [30703 (8)].

In reference to *SKY REEFER*, the Court in *GERTRUDE OLDENDORFF* stated: "while it is still true, as such, that under a COGSA analysis, foreign law can be, literally, less favorable than that of the United States, the distinguishing feature is that accommodating a party's desire for maximal advantage is not the motivating concern. Rather it is the more pragmatic goal of insuring that no party, subject to COGSA coverage, enjoys protection short of that guaranteed by the Act."

In *GERTRUDE OLDENDORFF*, the Court also found most important that there was no subsequent opportunity for review in dismissing the complaint against the defendants. The Court stated: "however, this option of retaining jurisdiction is simply not available with respect to the dispute at hand." *SKY REEFER* involved a dispute over enforcement of a foreign arbitration clause. "The safeguard of retained jurisdiction is therefore not applicable here because this case involves a foreign jurisdiction clause.". . . . "Since this precaution, to which *SKY REEFER* accorded substantial weight, is missing here, the Court is reluctant to enforce the forum selection clause and dismiss this action for improper venue."[18]

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[18] 204 F. Supp. 2d 675.

The Southern District of New York also referred to *International Marine Underwriters CU v. M/V KASIF KALKAVAN.*[19] The foreign forum did not recognize an action *in rem* against the vessel, thus raising the possibility that plaintiff would be deprived of its right under COGSA if suit were brought there. However, since the vessel had not yet been arrested in the district, the Southern District of New York exercised discretion to dismiss the *in rem* action. In this CLIPPER FAITH case, there is an *in rem* action with the posting of a Letter of Undertaking by the P&I Club to secure the owner only and liability to file the claim of the owner. The *in rem* claim cannot be dismissed because Mr. Lloyd's Affidavit confirms there is no *in rem* claim in the English High Court.[20] The District Court stated it retained jurisdiction over the Letter of Undertaking. However, only a judgment against Faith can be enforced against the Letter of Undertaking and yet the P & I Club is not defending the owner in England.

V. BOSSCLIP, THE CHARTERER, IS A UNITED STATES COGSA CARRIER

Under the laws of the United States, a carrier for purposes of COGSA includes not only a vessel owner but also a charterer. See, 46 U.S.C. 1301(a). As the District Court noted in *Intermetals Corp. v. Bargelink, LLC*,[21] the Court adheres to the plain

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[19] 1998 AMC 765, 989 F. Supp. 498 (S.D.N.Y. 1998)

[20] APPENDIX G, 65a.

[21] 03-2459, 2004 WL 2480487 (E.D. La. 2004).

language of COGSA to determine an entity's status as carrier or non-carrier.[22] To determine whether a party is a COGSA carrier under prevailing Fifth Circuit authority, a Court should look to COGSA's plain language and focus on whether the party entered into a contract with a shipper. Here, as clearly evidenced by APPENDIX F, the bill of lading, Bossclip entered into the contract of carriage with the shipper. However, on behalf of the vessel's owner, an agent, Heytor Gusmao CGM & Rep. LTDA, executed the contract of carriage to bind the vessel owner to the defined terms and conditions under COGSA. And yet, Bossclip is also a carrier, but will not be in an English court.

Within the Fifth Circuit, the term "carrier" includes all owners and charterers participating in the carriage of goods; therefore, there can be more than one COGSA carrier of a given shipment. In other words:

> "whoever enters the contract of carriage with the shipper in a given transaction comes within the definition of a "carrier" pursuant to Section 1301(a) of COGSA. See, e.g., *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1014-15 (2d Cir. 1972); *Thyssen Steel Corporation v. S.S. Adonis*, 364 F.Supp. 1332, 1335 (S.D.N.Y. 1973); *Wilmotte & Co., Inc. v. Cobelfret Lines, S. P. R. L.*, 289 F. Supp. 601 (M.D. Fla. 1968). If both the owner

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[22] See *Sabah Shipyard SDN.BHD v. M/V HARBEL TAPPER*, 178 F.3d 400 (5th Cir. 1999) and *Pacific Employers Ins. Co. v. M/V GLORIA*, 767 F.2d 229, 234 (5th Cir. 1985).

and the charterer are found to have entered a contract of carriage with the shipper, ***both*** can incur COGSA liability in the same shipping transaction as to their respective duties to the shipper. See, e.g. *Yeramex Intern. v. S.S. Tendo*, 595 F.2d 943 (4th Cir. 1979); *Trans-Amazonica Iquitos, S.A. v. Georgia Steamship Co.*, 335 F.Supp. 935 (S.D.Ga. 1971); *Tube Products of India v. S. S. Rio Grande*, 334 F. Supp. 1039 (S.D.N.Y. 1971); *Aljassim v. S. S. South Star*, 323 F. Supp. 918 (S.D.N.Y. 1971). One court has specifically found that more than one COGSA carrier may be identified in a given shipment, and that the term "carrier" need not be limited to a party on a bill of lading or contract of carriage. *Joo Seng Hong Kong Co., Ltd. v. S.S. UNIBULKFIR*, No. 78-2439, (S.D.N.Y. Oct. 23, 1979). The Unibulkfir Court found that reading Section 1301(a) and Section 1302 together reveals a definition of "carrier" broad enough to include *all* owners and charterers involved in the carriage of goods at issue.[23]

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[23] *Trade Arbed, Inc. v. S.S. EILLISPONTOS*, 482 F.Supp 991, 994 (S.D. Tex. 1980).

VI. THE DISTRICT COURT'S DECISION TO DISMISS THE ORIGINAL CARRIER RESPONDENTS EXTINGUISHES THE LIABILITY OF BOSSCLIP AND DOCKENDALE

Petitioners currently would have viable claims against Faith, Dockendale and Bossclip, in a United States court, without the tandem effect of the forum selection and jurisdiction clauses. The owner filed a claim as owner of the vessel as required in the Letter of Undertaking provided by a P & I Club. According to Mr. Lloyd in his Affidavit, under English law, based on the bills of lading terms at issue, there would be no contractual obligation on the part of Bossclip to the Petitioners in the English Court. The same will apply to the operator, Dockendale, who may have secured the cargo negligently. Accordingly, Bossclip would have no liability in the English Court and yet would be one of the carriers under U.S. law and U.S. public policy which this Court has dictated must be enforced. In addition, all carrier respondents , including Faith, are not subject to English jurisdiction. However, Bossclip is the only COGSA carrier to accept jurisdiction and it knows that the English Courts will find only one carrier, the owner.

The Claim Form[24] submitted to the English High Court names Bossclip, Faith and Dockendale. And yet there is no protection afforded to Petitioners that jurisdiction will attach to the vessel owner, Faith, nor to Dockendale, unless they accept service

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[24] APPENDIX I, 84a.

as only Bossclip has done. All of this would adversely affect the rights of Petitioners to the extent that they may not have any remedy whatsoever in the English Courts. Those remedies are available only in the United States Courts under COGSA and the cases interpreting it.

VII. NO AFFIDAVIT OF ENGLISH LAW BY RESPONDENTS

None of the carrier respondents have seen fit to supply the District Court with an Affidavit of an English solicitor or barrister to state any thing contrary to the Affidavit of Mr. Lloyd. Of course, the carrier respondents are aware that the Southern District of New York has accepted his Affidavit as stating the law of England. Thus, there is no contrary evidence to the Affidavit of Mr. Lloyd supporting the dismissal of this case and sending it to the Courts of England. There is no evidence by carrier respondents proving their liability would not be lessened in the English Courts. Nor is there evidence that their liability would not be extinguished as guaranteed by the stated public policy in COGSA to Petitioners by this Court in the *SKY REEFER* decision.

Petitioners argued in the District Court it should require the carrier respondents seeking dismissal be required to admit by stipulation that Bossclip will be a "carrier" in the English High Court and the carrier respondents will answer the claim in the English Court without claiming lack of jurisdiction. Petitioners also argued that if the District Court insisted on dismissing the Rule 14 (c) Third-Party Complaint tender of carrier respondents to

Petitioners, the District Court should insist that carrier respondents admit they are carriers and subject to the English jurisdiction. The District Court did not. These carrier respondents have very obviously failed to come forward with proof contrary to Mr. Lloyd's opinion. It is clear that the carrier respondents are attempting to escape liability under COGSA by forcing the case to London.

With some repetition, it is interesting to note that in addition to presenting no evidence contrary to Mr. Lloyd's affidavit, only Bossclip has instructed English solicitors to accept service of the claim in England, while all three vessel interests were represented by a single law firm in New Orleans through proceedings in the U.S. Court of Appeals for the Fifth Circuit. Please see the fax transmission of Messers Winter Scott date 7 August 2009[25], advising that they "are instructed on behalf of Bossclip B.V. only (and not the other defendants named in the Claim Form), and that we are authorized to accept service of the Claim form on their behalf only." Considering that the District Court retained jurisdiction of the Letter of Undertaking only in dismissing Petitioners' complaint with prejudice and the Rule 14(c) tender by Pacorini, even if Bossclip as charterer has liability as carrier in the English Court, only a judgment against the owner, Faith, can be secured by the Letter of Undertaking. It has become clear that Bossclip has succeeded in doing a number on our United States Courts beginning with its issuance of a bill of lading as an owner bill of lading

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[25] Appendix J, 89a.

in England and setting up jurisdiction and forum selection clauses requiring an English forum and English law for a common carriage having nothing to do with England.

VIII. FIFTH CIRCUIT FAULTY RELIANCE ON THE STOLT SYDNESS

In addition to the disregard of the only evidence on what the English courts will do according to Mr. Lloyd, the U.S. Court of Appeals for the Fifth Circuit relied on *The Stolt Sydness* [1997] 1 Lloyds Rep. 273 (Discussion pg. 9, ln 6). This reliance was misplaced in stating that a:

> "brief examination of English discussions, however, suggests that English Courts are likely to apply COGSA if the parties intended American law to govern the dispute. For example, the Queen's Bench (a subdivision of the English High Court) considered what role American law should play when an 'English law charter-party. . . incorporates an USA clause paramount, 'in *Mauritius Oil Refineries, Ltd. v. Stolt-Nielsen Nederlands B.V.* (The Stolt Sydness), [1997] 1 Lloyds's Rep. 273. The 'clause paramount' at issue expressly incorporated COGSA into the bill of lading. Id at 274. The English Court considered what effect to give this clause paramount and held that generally, the terms of COGSA would be incorporated as terms of the contract. Id at 281. Thus, the English Court honored the clear intention of the

parties to incorporate COGSA into the contract." (Emphasis added).[26]

This was an incorrect interpretation of the final decision of the High Court. This case proves the opinion of Mr. Lloyd and the arguments of Petitioners. The High Court went on to hold under the title "English law or U.S. law":

". . . though the parties may have chosen London as the place of arbitration and thus, by implication English law as the proper law of the charter. . .

"The words of the Statute (COGSA) are to be treated as written out in the contract and construed as contractual terms rather than as an act. . .

"Where, however, the English and foreign law as to the meaning to be given to identical wording of the international rule enacted in both England and the foreign country, it is hard to think that there are any circumstances in which the foreign law's view could prevail over that of the proper law"[27] (emphasis added).

As Mr. Lloyd states the proper law, the English law, will be used to interpret who is the carrier in English courts and the English Court will interpret

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[26] APPENDIX A, 1a.

[27] Stolt Sydness, supra

the owner as the only carrier.[28] The words "the owner or the charterer" in 46 U.S.C. § 1301(a) [30701(a)] as the "carrier" has been interpreted by U.S. Courts to be the owner and charterers who enter "into a contract of carriage with the shipper". In English Courts, it is either or, the owner or the charterer, not both. Bossclip, a COGSA carrier in the United States, will not be a carrier in England. With its solicitors representing only Bossclip and not the owner and operator, it is questionable that either Faith or Dockendale will accept service in English Courts which have no jurisdiction over them and no judgment will be granted against them in English courts. Yet, all respondents sought dismissal of Petitioners' complaint in the District Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. It is clear from the instructions to solicitors Winter Scott to defend only Bossclip, who is not a carrier in the English law under the terms of Bossclip's bill of lading making only Faith the carrier by sea, that a COGSA carrier will evade its liability under COGSA. There is no evidence to the contrary and *SKY REEFER* instructions are being disregarded by the District Court and Fifth Circuit.

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[28] Mr. Lloyd relies on THE STARSIN 1 Lloyd's Rep. 571, 2003 AMC 913 Professor William Tetley Q.C. of Canada states in his article: "The House of Lords decision in THE STARSIN" (2004) 35 JMLC 121-139: "The House of Lords, however, dismissed summarily the suggestion of Rix, L.J. that both the time charterer and the shipowner may have been carriers in this case."

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed May 28, 2009]

No. 07-30727

AMBRACO INC; GREAT AMERICAN INSURANCE COMPANY

Plaintiffs-Appellants

v.

BOSSCLIP B V, in personam; DOCKENDALE SHIPPING COMPANY LTD, in personam; FAITH SHIPPING COMPANY LTD, in personam

Defendants-Appellees

Consolidated With Case No. 07-31156

AMBRACO INC; GREAT AMERICAN INSURANCE COMPANY

Plaintiffs-Appellants

v.

CLIPPER FAITH MV, her engines, tackle, apparel, furniture, etc, in rem; BOSSCLIP B V, in personam; DOCKENDALE SHIPPING COMPANY LTD, in personam; FAITH SHIPPING COMPANY LTD, in personam

Defendants-Third Party Defendants-Appellees

v.

PACORINI HOLDING, LLC

Defendant-Third Party Plaintiff-Appellant

Appeals from the United States District Court
for the Eastern District of Louisiana

Before GARWOOD, DENNIS, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

Plaintiff-Appellant Ambraco, Inc. ("Ambraco") contracted with Defendants-Appellees M/V Clipper Faith ("Clipper Faith"), Bossclip B.V. ("Bossclip"), Dockendale Shipping Co., Ltd. ("Dockendale"), and Faith Shipping Co., Ltd. ("Faith") (collectively "Vessel Interests") to transport a cargo of bailer twine from Brazil to New Orleans, Louisiana. The cargo was damaged while in the custody of the Vessel Interests or Defendant–Third-Party Plaintiff–Appellant Pacorini Holding, L.L.C. ("Pacorini"), the cargo's discharging stevedore. Ambraco filed a maritime cargo damage case against the Vessel Interests and Pacorini. The district court dismissed the claims against the Vessel

Interests for improper venue based upon a forum selection clause in the contracts of carriage, which are known commonly as bills of lading. Ambraco appeals the district court's dismissal of its claims against the Vessel Interests, asserting that the forum selection clause is invalid as a violation of the public policy codified in the Carriage of Goods by Sea Act ("COGSA"), Pub. L. No. 74-521, ch. 229, 49 Stat. 1207 (reprinted in the notes to 46 U.S.C. § 30701).

In a consolidated case, Pacorini appeals the district court's dismissal of its third-party complaint for indemnification against the Vessel Interests. The district court dismissed Pacorini's claims after finding that Federal Rule of Civil Procedure 14(c) was not available because the Vessel Interests were not true "third-party defendants" under Rule 14(c). Pacorini asserts that Rule 14(c) expressly provides that a third-party plaintiff may implead a third-party defendant who may be liable to it for contribution or indemnity. For the following reasons, we affirm in part, vacate in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ambraco delivered several thousand bales of bailer twine to the Vessel Interests, who were to transport this cargo from Brazil to the United States on the Clipper Faith, an ocean-going cargo vessel owned by Faith. Pacorini acted as the cargo's discharging stevedore in New Orleans.

The cargo was covered by seventeen bills of lading, all identical in terms and conditions, issued by Bossclip to the other Vessel Interests. The bills of

lading contained three clauses critical to the present dispute:

> 1. Definitions
>
> (a) "Carrier" means the carrier as stipulated on page 2 of this bill of lading, and insofar as carriage by sea is concerned, the registered owner of the vessel.
>
> 2. Jurisdiction
>
> The contract evidenced by this bill of lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the courts of any other country.
>
> . . . .
>
> 5. Clause Paramount
>
> (d) If the carriage is to or from the U.S., the Carriage of Goods By the Sea Act 1936 of the United States ("COGSA") shall apply (whether the goods are stowed on or under deck) . . . .

These bills of lading were issued on December 28, 2005, and their validity is not in question.

When the cargo arrived in New Orleans, Ambraco discovered extensive damage to the bailer twine. Ambraco immediately instituted proceedings to seek compensation from the Vessel Interests and Pacorini for the damage to its cargo. First, Ambraco threatened to arrest, or seize, the vessel to gain *in rem* jurisdiction

over the ship. The parties agreed to issue a Letter of Undertaking in the amount of $2,000,000 to stand in the place of the ship for purposes of any future *in rem* action. On November 14, 2006, Ambraco filed an original complaint in the District Court for the Eastern District of Louisiana against the Vessel Interests. One month later, the named *in personam* appellees—Bossclip, Dockendale, and Faith—filed responsive pleadings raising a defense of improper venue. On March 3, 2007, Ambraco filed a supplemental and amended complaint naming Pacorini as an additional defendant. On May 21, 2007, Faith made a restricted appearance as the owner of the Clipper Faith to defend Ambraco's *in rem* action.

On April 26, 2007, the *in personam* Vessel Interests filed a motion to dismiss Ambraco's claims based upon the forum selection clause contained in the bills of lading. The district court dismissed the entire case on May 25, 2007. The district court held that the forum selection clause in the bills of lading required all disputes to be adjudicated in the High Court of England. Thus, the district court held that it lacked jurisdiction over the claim. Although Ambraco had amended its complaint to include a claim against Pacorini, Pacorini had not appeared by the time the district court dismissed the suit.

Ambraco moved under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. In support, Ambraco submitted an affidavit on issues of English law from English solicitor Mark Andrew Lloyd ("Lloyd"). The Vessel Interests disputed the motion to alter or amend the judgment and contested the introduction of Lloyd's affidavit. The district court denied Ambraco's motion to alter or amend the

judgment, again concluding that the forum selection clause was valid and divested the district court of jurisdiction over the claim.

The district court did, however, partially reopen the case, clarifying that its judgment dismissing the Vessel Interests' claims did not extend to Ambraco's claims against Pacorini. The district court also asserted jurisdiction over the Letter of Undertaking, thus maintaining jurisdiction over the *res*. On July 18, 2007, Pacorini filed an answer and a third-party complaint under Federal Rule of Civil Procedure 14(c), naming the dismissed Vessel Interests as third-party defendants to Ambraco's suit against Pacorini. On October 3, 2007, the Vessel Interests filed a motion to dismiss Pacorini's claims and the district court granted this motion on November 5, 2007, holding that Rule 14(c) was not available to implead parties previously dismissed from the suit. After denying Pacorini's motion for reconsideration, the district court granted Pacorini's motion to certify the order dismissing the third-party complaint as a final judgment under Federal Rule of Civil Procedure 54(b). The court entered final judgment dismissing the case with prejudice on January 10, 2008.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had admiralty jurisdiction over the case pursuant to 28 U.S.C. § 1333. This court has jurisdiction under 28 U.S.C. § 1291, as the appeal arises from a final judgment entered by the district court.

This court reviews the district court's decision to enforce a forum selection clause de novo. *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008). "Our de novo review under either Rule 12(b)(1) or Rule 12(b)(3) requires us to view all the facts in a light most favorable to the plaintiff." *Id.* at 448 (Dennis J., dissenting).[1] "Moreover, under both Rule 12(b)(1) and Rule 12(b)(3), the court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Id.* at 449 (citing *Lane ex rel. Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) ("[T]he court may find a plausible set of facts by considering any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (internal quotation marks omitted))); *Murphy v Schneider Nat'l Inc.*, 362 F.3d 1133, 1138–40 (9th Cir. 2004) (holding that, in the absence of factual findings made by the district court based upon an evidentiary hearing, affidavits and other evidence submitted by the non-moving party in the context of a Rule 12(b)(3) challenge are to be viewed in the light most favorable to that party).

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[1] "[T]his court on at least [three] previous occasions has declined to address the 'enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under FED. R. CIV. P. 12(b)(1) [or] 12(b)(3).'" *Ginter*, 536 F.3d at 448 (Dennis J., dissenting) (quoting *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005)); *see Haynsworth v. The Corporation*, 121 F.3d 956, 961 (5th Cir. 1997). We once again decline to settle this dispute.

This court also reviews the district court's order dismissing Pacorini's third-party claims de novo. *See Lane*, 529 F.3d at 557.

III. ANALYSIS

A. Enforcement of the Forum Section Clause

On appeal, Ambraco argues that the forum selection clause in the bills of lading are invalid as the forum selection clause contradicts the public policy evidenced in COGSA, specifically § 3(8), which limits a common carrier's freedom to lessen the minimum liability contained in the Act.[2] The district court held that the forum selection clause did not violate public policy and that the clause, as enforced, divested the court of jurisdiction.

Section 3 of COGSA provides "explicit standards of conduct, and it is designed to correct specific abuses by carriers." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995). "In the 19th century it was a prevalent practice for common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which the plaintiffs had to present their notice of claim or bring suit, and capping any damage

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[2] Ambraco has filed what it terms a "protective claim" in the High Court of Justice in London. The Vessel Interests suggest that by filing this claim in the English courts, Ambraco has tacitly acknowledged that the English courts are the correct forum in which to seek relief. The district court correctly concluded that Ambraco's pursuit of its claim in England, and thereby its attempt to protect its interests in English courts, was nothing more than common sense.

awards per package." *Id.* at 534–35. COGSA imposes "substantive obligations and particular procedures" with which carriers participating in international maritime commerce must comply; most critically, "§ 3(8) prohibits a carrier from altering [its substantive obligations] to its advantage in a bill of lading." *Id.* at 535. Section 3(8) provides,

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

COGSA § 3(8).

While COGSA states that carriers may not lessen their liability beyond that stipulated to by law, COGSA does not prohibit parties from agreeing to enforce the bill of lading provisions in a particular forum. *Sky Reefer*, 515 U.S. at 535.[3] Thus, a choice-of-forum clause

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[3] COGSA was "the culmination of a multilateral effort" to establish "a uniform system of international rules governing carrier and shipper liability." *Haynsworth*, 121 F.3d at 968. The international community developed this uniform system, known internationally as the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 ("Hague Rules"), specifically to govern disputes such as that before us—disputes over the liability of shippers and carriers participating in international trade. The Hague Rules and COGSA—the domestic version of the Hague Rules—are meant to be applied in international forums of dispute resolution. *See Sky Reefer*, 515 U.S. at 536–37.

is presumptively valid. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). It will, however, be "held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* The critical inquiry to determining whether a clause violates public policy is whether "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 36 (5th Cir. 1997) (per curiam); *see also Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997) (recognizing the holding in *Mitsui* as binding precedent that rejected a distinction between foreign arbitration clauses and forum selection clauses). "The party resisting enforcement on these grounds bears a 'heavy burden of proof.'" *Haynsworth*, 121 F.3d at 963 (quoting *Bremen*, 407 U.S. at 17).

Ambraco presents two arguments for why enforcement of the forum selection clause and the choice-of-law provisions would lessen the statutory remedies available under COGSA. First, Ambraco argues that English courts will not recognize the Vessel Interests as "carriers," thus impermissibly lessening the Vessel Interests' liability below that which COGSA guarantees. Second, Ambraco argues that English courts do not permit *in rem* actions, and that the right to an *in rem* action is substantively guaranteed.

1. In personam actions

It is undisputed that the bills of lading provide that the English High Court is the forum for all disputes. English courts have "repeatedly [been] recognized to be fair and impartial." *Haynsworth*, 121 F.3d at 967. As the Supreme Court stated, "Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation." *Bremen*, 407 U.S. at 12. Thus, English courts themselves may be presumed to be fair. The Supreme Court's decision in *Sky Reefer* requires us, however, to look beyond this presumption of fairness to discern whether the English courts, in addressing the present dispute, will impermissibly limit the Vessel Interests' liability.

The clause paramount of the bill of lading provides that "[i]f the carriage is to or from the U.S., the Carriage of Goods By the Sea Act 1936 of the United States ("COGSA") shall apply." Despite this clause paramount, Ambraco asserts that English courts will apply English law. A brief examination of English decisions, however, suggests that English courts are likely to apply COGSA if the parties intended American law to govern the dispute. For example, the Queen's Bench (a subdivision of the English High Court) considered what role American law should play when an "English law charter-party[4] incorporates an

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[4] Black's Law Dictionary defines "charter-party" as

> [a] contract by which a ship . . . is let to a merchant for the conveyance of goods on a determined voyage to one or more places. . . . The term "charter party" . . . designates the document in which are set forth the arrangements and contractual engagements entered into when one

USA clause paramount" in *Mauritius Oil Refineries Ltd. v. Stolt-Nielsen Nederlands B.V. (The Stolt Sydness)*, [1997] 1 Lloyd's Rep. 273. The "clause paramount" at issue expressly incorporated COGSA into the bill of lading. *Id.* at 274. The English court considered what effect to give this clause paramount and held that, generally, the terms of COGSA would be incorporated as terms of the contract. *Id.* at 281. Thus, the English court honored the clear intention of the parties to incorporate COGSA into the contract.

The English House of Lords, in *Scruttons Ltd. v. Midland Silicones, Ltd.*, 1962 WL 21259, [1962] A.C. 446 (H.L.), considered whether "stevedores, who admittedly by their negligence caused damage to certain cargo consigned to the [plaintiffs] under a bill of lading . . . , can take advantage of a provision for limitation of liability contained in that document," *id.* at 465. The bill of lading at issue included a choice-of-law provision which stipulated that COGSA would apply to all disputes over the transportation of the cargo. *Id.* at 449. The stevedores argued that the bill of lading contained a clause limiting liability for all "carriers," which they asserted COGSA defines as including stevedores. *Id.* The House of Lords found that there was "no reason for saying that the word 'carrier' either in the bill of lading or in the United States [COGSA] means or includes a stevedore." *Id.* at 466. The court relied upon *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), in

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person . . . takes over the use of the whole . . . of a ship belonging to another.

BLACK'S LAW DICTIONARY 162 (6th ed. 1991).

which the Supreme Court held that COGSA did not define "carrier" to include stevedores and did not intend the limitation on liability to extend to stevedores, *id.* at 302–03. Although the English court eventually applied English law to fill the gaps left by the American law, this decision persuades us that English courts will honor the parties intention to apply COGSA and make every attempt to comply with American law.

In addition, Ambraco has provided no convincing evidence that an English court, applying COGSA, would impermissibly limit the Vessel Interests' liability.[5] Thus, this court must assume that English courts of law would honor the clause paramount in the bills of lading and apply COGSA to the dispute at hand. Accordingly, we hold that Ambraco has not met its high burden of proving that "the choice-of-forum

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[5] Ambraco has provided two sources of support for its contention that English courts will lessen the Vessel Interests' liability, neither of which provide this court much guidance. First, Ambraco urges this court to consider an affidavit by English solicitor Lloyd. Lloyd's affidavit discusses only the English courts' application of English law to disputes such as these, not the English courts' application of COGSA. In fact, Lloyd begins his analysis "on the basis that English law would be deemed to be applicable." In addition, Ambraco relies upon a decision out of the Southern District of New York; however, the case is distinguishable from the facts at hand because it too considered only an English court's interpretation of English law, not the English court's interpretation of COGSA. *See Cent. Nat'l-Gottesman, Inc. v. M.V. "Gertrude Oldendorff,"* 204 F. Supp. 2d 675 (S.D.N.Y. 2002). As discussed above, this court has not been asked to decide whether English courts applying English law would lessen liability beyond that required by COGSA, but rather, whether English courts applying COGSA will impermissibly lessen the Vessel Interests' liability. We find Ambraco's submissions on this point unhelpful.

and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies." *Mitsubishi*, 473 U.S. at 637 n.19.

2. In rem actions

Ambraco also argues that enforcement of the forum selection clause would lessen the Vessel Interests' liability because of the unavailability of an *in rem* action against the Clipper Faith. English courts no longer recognize an *in rem* action "when the ship owner is entitled to sovereign immunity, nor when the plaintiff has already obtained [or is seeking] judgment against the shipowner in personam in relation to the same dispute." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 342 (2000). Thus, if an *in rem* action is a substantive right protected under COGSA § 3(8), a failure to provide an *in rem* action might be unreasonable as against COGSA public policy. *See Allianz Ins. Co. v. Cho Yang Shipping Co.*, 131 F. Supp. 2d 787, 794 (E.D. Va. 2000). We need not, however, decide this thorny issue here. The district court's preservation of jurisdiction over the ship—here in the form of a surety bond—moots issue of the need for a separate *in rem* action. *See Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 107 (2d Cir. 2002) (per curiam) (holding that "[a] letter of undertaking replaces the vessel as the *res* and moots the question of the need for separate *in rem* claim").

Accordingly, we hold that Ambraco has not proven that the enforcement of the forum selection clause in the bills of lading would violate public policy. Ambraco's failure to meet this heavy burden is fatal to its claim. *Cf. Sky Reefer*, 515 U.S. at 537 (holding that

"[i]t would also be out of keeping with the objects of the [Hague Rules] for the courts of this country to interpret COGSA to disparage the authority or competence of international forums for dispute resolution" absent a showing that the foreign court would issue a holding contrary to public policy).[6] We therefore affirm the district court's order dismissing Ambraco's claims against the Vessel Interests.

B. Rule 14(c)

In a consolidated case, Pacorini appeals the district court's dismissal of its claim for contribution or indemnity under Federal Rule of Civil Procedure 14(c). The district court dismissed Pacorini's Rule 14(c) tender of the Vessel Interests to Ambraco and Pacorini's claims against the original defendants/third-party defendants. The district court held that Rule 14(c) was not available to bring claims against third-party defendants who had already been a party to the suit as original defendants, and it suggested that the proper mechanism for bringing these types of claims was through Rule 13(g). Pacorini appeals only that part of the district court's order

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[6] The Vessel Interests also argue that even if the English courts were to interpret the term "carrier" narrowly, Ambraco would still be able to recover the full amount of its loss from Faith. The Vessel Interests point to no authority to support their contention. Thus, their argument is insufficient to raise the claim on appeal and they have waived it. *See* FED.R.APP.P. 28(a)(9) (requiring an appellant to state its "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir. 1989).

which dismissed its claim for contribution or indemnification against the Vessel Interests.[7]

The district court held that Pacorini could have brought its claims against the Vessel Interests by asserting a cross-claim under Rule 13(g). Rule 13(g) provides,

> A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

FED. R. CIV. P. 13(g). By its terms, Rule 13(g) requires the cross-claimant to be a party to the lawsuit at the time the cross-claim is asserted. However, by the time Pacorini asserted its claims against the Vessel Interests, the Vessel Interests had already been

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[7] The district court, however, properly dismissed Pacorini's tender of the Vessel Interests to Ambraco. Ambraco's direct action against the Vessel Interests had already been dismissed pursuant to the forum selection clause and any tender would violate the public policy—announced in *Bremen*, 407 U.S. at 9—of enforcing forum selection clauses. *See Texaco Exploration & Prod. Co. v. AmClyde Engineered Prods. Co.*, 243 F.3d 906, 909–12 (5th Cir. 2001) (refusing "to create a Rule 14(c) exception that would allow third parties unilaterally to nullify an arbitration clause," and staying the litigation below pending the outcome of the arbitration).

dismissed from the suit and were no longer a party to the underlying suit; thus, a cross-claim under Rule 13(g) was no longer an available mechanism for asserting Pacorini's claims against the Vessel Interests. The district court therefore erred in holding that Pacorini's claims could have been properly brought under Rule 13(g).

Instead, Pacorini properly brought its claims pursuant to Rule 14(c). Rule 14(c) provides,

> (1) Scope of Interpleader. If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(I) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff—for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.
>
> (2) Defending Against a Demand for Judgment for the Plaintiff. The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

FED. R. CIV. P. 14(c). That is, Rule 14(c) permits a defendant to implead a third-party defendant for two

purposes: (1) to seek contribution or indemnification from the third-party defendant, and (2) to tender the third-party defendant to the plaintiff. *See Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 399–400 (5th Cir. 2003) (recognizing that Rule 14(c) allows a third-party plaintiff either to seek contribution from the third-party defendant directly or to tender the third-party defendants to the plaintiff). In addition, the Rule requires the third-party plaintiff (1) to assert an action sounding admiralty or maritime, (2) that arises out of "the same transaction, occurrence, or series of transactions or occurrences" as the plaintiff's original claim, and (3) over which the district court has jurisdiction. FED. R. CIV. P. 14(c).

All parties agree that Ambraco asserted an admiralty claim under Rule 9(h) and that Pacorini's claim for indemnity against the Vessel Interests stems from the same transaction as Ambraco's original cause of action. The district court had jurisdiction over Pacorini's claims against the Vessel Interests pursuant to 28 U.S.C. § 1333. Having met the three preconditions for asserting a claim under Rule 14(c), we can see no other justification for denying Pacorini the right to pursue its indemnification claims against the Vessel Interests. Although it is true that the forum selection clause requires the Vessel Interests and Ambraco to settle their dispute in English courts, Pacorini is not bound by a similar forum selection clause that would limit the district court's jurisdiction. Thus, we see no reason to sustain the district court's dismissal of Pacorini's claims.

We do, however, recognize that it would be the height of judicial inefficiency to conduct two separate inquiries into fault arising from the same transaction,

as would happen were Pacorini's action to proceed concurrent with or even in advance of Ambraco's cause of action against the Vessel Interests in the English court. For this reason, the district court, on remand, may consider staying Pacorini's claims pending a resolution of the English court's adjudication of Ambraco's claims against the Vessel Interests. *See Pac. Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 242–43 (5th Cir. 1985) (recognizing the propriety of staying a third-party plaintiff's claims for indemnity and contribution pending arbitration). Such a resolution, however, is left to the sound discretion of the district court. *See Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 204 n.6 (5th Cir. 1985) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (recognizing that the district court's discretionary authority to issue a stay "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants")).

For these reasons, we vacate the district court's dismissal of Pacorini's claims for contribution and indemnification and remand for further proceedings consistent with this opinion.

IV. CONCLUSION

The forum selection clause in the bills of lading divested the district court of jurisdiction over Ambraco's claims against the Vessel Interests. Although Ambraco must bring its claims against the Vessel Interests in England, Pacorini may seek indemnification and contribution from the Vessel

Interests in federal district court. Accordingly, we affirm in part, vacate in part, and remand.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 06-9966
SECTION "C"

[Filed November 7, 2007]

AMBRACO, INC. and GREAT AMERICAN INSURANCE COMPANY	)
VERSUS	)
M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, and BOSSCLIP B.V., DOCKENDALE SHIPPING CO., LTD. and FAITH SHIPPING COMPANY, LTD., *in personam*,	)

ORDER AND REASONS

This matter comes before the Court on a motion to dismiss the Third Party Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and/or 12(b)(3) filed by the defendants, Bossclip B.V., Dockendale Shipping Co. Ltd., and Faith Shipping Co. Ltd. ("Original Defendants") (Rec. Doc. 78). Pacorini Holding, LLC ("Pacorini") opposes the motion; additionally, Ambraco, Inc. and Great American Insurance Co. ("Plaintiffs") oppose the motion. The motion is before the Court on the briefs, without oral

argument. Having considered the memoranda of counsel, the record and the applicable law, the Court finds that the motion is **GRANTED** (Rec. Doc. 78).

I. BACKGROUND

This Court has already described the background circumstances leading to the controversy between the parties in the order granting the Original Defendants' motion to dismiss Plaintiffs' complaint on identical grounds (Rec. Doc. 42). In brief, Plaintiffs filed suit against the Original Defendants on November 14, 2006 following damage to several thousand bales of twine that the Original Defendants had transported on behalf of Plaintiffs. Plaintiffs amended their complaint on March 8, 2007 naming Pacorini as an additional defendant (Rec. Doc. 16). Plaintiffs alleged liability against Pacorini for negligently discharging its duties as stevedore of the damaged cargo. On May 25, 2007, this Court held that the forum selection clause in the bill of lading was binding between the Plaintiffs and the Original Defendants, and thus, granted the Original Defendants' motion to dismiss the complaint pursuant to Rule 12(b)(3) (Rec. Doc. 42). Then, on July 18, 2007, defendant Pacorini filed an answer to the amended complaint in which it asserted a "third-party complaint" against the Original Defendants (Rec. Doc. 62). Pacorini's third-party complaint sought indemnity or contribution from the Original Defendants to the extent that Pacorini was liable to Plaintiffs. Additionally, Pacorini asked that the Original Defendants "be held liable directly to Plaintiffs herein for their respective degree of fault, all as provided by Fed.R.Civ.P. 14(c)." (Rec. Doc. 62, p. 11 ¶ 3).

II. ARGUMENTS OF THE PARTIES

The Original Defendants argue that Pacorini's third-party complaint is improper because this Court has already determined that the Eastern District of Louisiana is an improper venue to resolve Plaintiffs' dispute with the Original Defendants, and thus, Rule 14(c) cannot be used as a "back-door" to tender Original Defendants to Plaintiffs. Additionally, the Original Defendants maintain that Pacorini's indemnity claim is premature because Pacorini is not yet liable to Plaintiffs.

In opposition, Pacorini argues that in admiralty cases Rule 14(c) expressly provides that a third-party plaintiff may implead a third-party defendant who **may** be liable to the third-party plaintiff for contribution or indemnity. Similarly, Plaintiffs argue that dismissal of the third-party complaint is improper. Indeed, Plaintiffs argue that the Court should not dismiss the Rule 14(c) tender of the Original Defendants to Plaintiffs. To support their position, Plaintiffs assert that the Supreme Court has interpreted the Carriage of Goods by Sea Act ("COGSA") to prevent dismissals based on forum selection clauses in bills of lading when such clauses are against public policy. Plaintiffs aver that the instant case is a prime example of an unenforceable forum selection clause because the provision operates as a prospective waiver of Plaintiffs' rights under COGSA, and thus, is against public policy. In the alternative, Plaintiffs argue that the Original Defendants should be required to stipulate that they are "carriers" subject to the English High Court's jurisdiction.

III. STANDARD OF REVIEW

The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is the same as that for a Rule 12(b)(6) motion. *U.S. v. City of New Orleans*, 2003 WL 22208578 (E.D.La. 2003); *Benton v. U.S.*, 960 F.2d 19, 21 (5th Cir. 1992). This Court cannot dismiss a complaint under Rule 12(b)(6) unless it appears beyond a doubt that the plaintiff cannot prove a plausible set of facts in support of his claim which would entitled him to relief. *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A court's ultimate conclusion that a case should be dismissed may rest "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. U.S.*, 74 F.3d 656, 659 (5th Cir. 1996) (citations omitted).

IV. ANALYSIS

1. Rule 14(c) Tender of Original Defendants to Plaintiffs

The Federal Rules of Civil Procedure make the following third-party practice applicable to maritime suits:

> When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(a)(1), as a third-party plaintiff, may bring in a **third-party defendant** who may be wholly or partly liable,

> either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the **third-party defendant** in favor of the plaintiff, in which event the **third-party defendant** shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the **third-party defendant** as well as the third-party plaintiff. Fed.R.Civ.P. 14(c) (emphasis added).

The purpose of Rule 14(c) is to insert into federal practice the process of impleader, "by which a defendant can bring in as a **third-party defendant** one claimed by the defendant to be liable to him for all or part of the plaintiff's claim." *Marubeni-Iida (America), Inc., v. Toko Kaiun Kabushiki Kaisha and the SS Egle v. Texports Stevedore*, 327 F.Supp. 519 (D.C. Tex. 1971) (emphasis added). The procedure attempts to dispose of the entire subject matter arising from one set of facts in one action for the expeditious and economical administration of justice. *Id.* Indeed, "Rule 14(c) was designed to expedite and consolidate admiralty actions by permitting a third-party plaintiff to demand judgment against a **third-party defendant** in favor of the plaintiff. *Texaco Exploration and Production Co. v. Amclyde Engineered Products Company, Inc.*, 243 F.3d 906 (5th Cir. 2001) (emphasis added). As a consequence, the plaintiff is then required to assert his claims directly against the **third-party defendant**. *Id.* (citing 6 Charles Alan Wright &

Arthur R. Miller, *Federal Practice and Procedure* § 1465 (2d ed. 1990) (emphasis added)).

To determine whether Pacorini can properly tender the Original Defendants under Rule 14(c), the Court turns to Black's Law Dictionary. First, "third party" is defined as: "[a] person who is not a party to a lawsuit, agreement, or other transaction but who is usu. somehow implicated in it; someone other than the principal parties. -- Also termed outside party; third person." BLACK'S LAW DICTIONARY 1518 (8th ed. 2004). Additionally, Black's contains an entry for "third party defendant," which is defined as "[a] party brought into a lawsuit by the original defendant." *Id.*

In this case, the Court notes that the Original Defendants were brought into the lawsuit by Plaintiffs in the initial complaint; and Pacorini was brought into the lawsuit by Plaintiffs in the amended complaint. Therefore, Pacorini's third-party complaint asserts a claim against the same parties that were already involved in the suit, i.e. the Original Defendants. Again, Rule 14(c) states that "the defendant or person who asserts a right under Supplemental Rule C(6)(a)(1), as a third-party plaintiff, may bring in a **third-party defendant** who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff . . . ." Fed.R.Civ.P. 14(c) (emphasis added). Clearly, the Original Defendants were not brought into the lawsuit by Pacorini because they were already involved in the lawsuit. Thus, the Original Defendants do not meet the definition of "third-party defendants."

The Court reminds the parties that in federal civil practice, one defendant's claim against another defendant is a "cross-claim." Fed.R.Civ.P. 13(g).

Consequently, Pacorini cannot tender the Original Defendants to Plaintiffs under Rule 14(c). Simply, Rule 14(c) is inapplicable to the present case. Therefore, Pacorini cannot prove a plausible set of facts in support of his claim under Rule 14(c). *See Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Accordingly, the Original Defendants motion to dismiss the third-party complaint is **GRANTED** with respect to the Rule 14(c) tender of the Original Defendants to Plaintiffs.

2. Pacorini's Claims Against the Original Defendants

The Original Defendants argue that Pacorini's claim for contribution or indemnity has no legal basis, and that the claim is premature because no determination of liability has been made in the underlying dispute. In its filings with the Court, Pacorini argues that it has "independent, direct, and ripe claims for contribution and indemnity against the Third-party Defendants under Rule 14(c)." (Rec. Doc. 82, Memorandum in Opposition to the Motion to Dismiss the Third Party Complaint, p. 3). As the Court has already demonstrated, Rule 14(c) does not apply to this case. Therefore, Pacorini cannot assert claims against the Original Defendants for indemnity and/or contribution under Rule 14(c).

Yet, Federal Rule of Civil Procedure 13(g) allows that a "cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of claim asserted in the action against the cross-claimant." Fed.R.Civ.P. 13(g). Furthermore, "[u]nder Fed.R.Civ.P. 13(g), cross claims are permissive rather than compulsory and a party to

an action has the option to pursue it in an independent action." *Dunn v. Sears, Roebuck, & Co.*, 645 F.2d 511, 512 n. 1 (5th Cir. 1981). Indeed, "a party who decides not to bring a his claim under Fed.R.Civ.P. 13(g) will not be barred by *res judicata*, waiver, or estoppel from asserting it in a later action." *Id.* Here, Pacorini cannot prove a plausible set of facts in support of his claim under Rule 14(c), and thus, dismissal of the complaint is proper. *See Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Consequently, the Original Defendants motion to dismiss the third-party complaint is **GRANTED** with respect to the Rule 14(c) claims for indemnity and/or contribution.

V. CONCLUSION

For the reasons stated above,

IT IS ORDERED that the Original Defendants' motion to dismiss the Third Party Complaint is **GRANTED** (Rec. Doc. 78).

New Orleans, Louisiana this 5th day of November, 2007.

/s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 06-9966
SECTION "C"

[Filed May 25, 2007]

AMBRACO, INC. and GREAT AMERICAN INSURANCE COMPANY	)
VERSUS	)
M/V CLIPPER FAITH, her engines, tackle, apparel, furniture, etc., *in rem*, and BOSSCLIP B.V., DOCKENDALE SHIPPING CO., LTD. and FAITH SHIPPING COMPANY, LTD., *in personam*	)

ORDER AND REASONS

Before this Court is a Motion to Dismiss Complaint pursuant to Rules 12(b)(1) and/or 12(b)(3) of the Federal Rules of Civil Procedure.[1] Defendants seek dismissal of this maritime cargo damage case for improper venue, alleging there is a valid and

[1] Rec. Doc. 24.

enforceable forum selection clause requiring that all disputes arising under the contract of carriage be heard by the High Court of Justice in London, England.

After reviewing the complaint, the motion and memoranda, and applicable law, the Court finds the forum selection clause is valid and enforceable. For the reasons set forth below, Defendants' Motion to Dismiss Complaint is **GRANTED**.

I. Background

This is an action by Ambraco, Inc. and Great American Insurance Company to recover substantial damages sustained to cargo, several thousand bales of baler twine covered by bills of lading CPERC0603CBNO018 through CPERC0603CBNO034,[2] which allegedly resulted from improper loading, securing and/or handling of the cargo while it was in the care, custody and control of Defendants and/or aboard the M/V Clipper Faith. Plaintiffs allege that on December 31, 2005, the cargo was delivered to the Defendants at the Port of Cabedelo, Brazil. Plaintiffs admit the Defendant issued bills of lading for carriage of the cargo. Plaintiffs allege that when the cargo arrived in the ports of Houston, Texas, and New Orleans, Louisiana, it was damaged. Plaintiffs accepted the security extended by insurers of the M/V Clipper Faith and her owners; on February 17, 2006, a Letter of Undertaking (LOU) in the amount of $2,000,000.00 was issued on

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[2] The Court notes that Plaintiffs also cite "CPERC0603RINO001 and others" in their memorandum.

behalf of Assuranceforeningen Skuld (Skuld), to Ambraco, Inc. to secure and prevent the arrest of the M/V Clipper Faith, which was then in the Port of New Orleans. Plaintiffs filed suit in the Eastern District of Louisiana on November 14, 2006.[3] Defendants filed an answer on December 14, 2006.[4] On March 3, 2007, Plaintiffs filed a supplemental and amended complaint, adding Pacorini Holding, LLC (successor to Pacorini USA, Inc.) as a party to the action, alleging it was the discharging stevedore of the cargo arriving aboard the M/V Clipper Faith which is the subject of the original complaint.[5] Pacorini Holding, LLC's answer was due on April 16, 2007;[6] to date no answer has been filed. On March 29, 2007, Plaintiffs filed suit in the High Court of London;[7] the suit is identical to that filed in the Eastern District of Louisiana. On April 26, 2007, Defendants filed the motion to dismiss for improper venue which is the subject of this Order.

II. Discussion

The Fifth Circuit has declined to address the "enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed.R.Civ.P. 12(b)(1) [or]

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[3] Rec. Doc. 1.

[4] Rec. Doc. 6.

[5] Rec. Doc. 16.

[6] Rec. Doc. 18 and 29.

[7] Rec. Doc. 24, Exhibit 1.

12(b)(3)..."[8] In *Albany Insurance*, the Fifth Circuit treated a motion to dismiss for improper venue based on a forum selection clause as proper under Rule 12(b)(3), although in that case it reversed the granting of the motion because it was untimely.[9] The Fifth Circuit affirmed a district court's granting of a Rule 12(b)(3) motion to dismiss for improper venue based on a forum selection clause.[10] In addition, other circuits have agreed that a motion to dismiss based on a forum selection clause is properly brought pursuant to Rule 12(b)(3).[11] Plaintiffs briefed the issue of dismissal pursuant to Rule 12(b)(1). However, since the Fifth Circuit has accepted Rule 12(b)(3) as a proper method for seeking dismissal for improper venue based on a forum selection clause, the Court need not decide whether the Rule 12(b)(1) motion, plead as an

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[8] *Haynsworth v. The Corporation*, 121 F.3d 956, 961 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998).

[9] *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 f.3d 907, 909 & n. 3 (5th Cir. 1993).

[10] *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 37 (5th Cir. 1997).

[11] See *Continental Ins. Co. v. Polish S.S. Co.*, 346 F.3d 281, 282 (2d Cir.2003), affirming Rule 12(b)(3) dismissal in favor of foreign arbitration; *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir.1998), cert. denied, 525 U.S. 1093, 119 S.Ct. 851, 142 L.Ed.2d 704 (1999), motion to dismiss based on forum selection clause in international agreement should be brought under Rule 12(b)(3)); *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir.1996), Rule 12(b)(3) motion proper method to invoke forum selection clause; *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir.1995), same.

alternative by Defendants out of an abundance of caution, is appropriate.

Generally a forum selection clause in a bill of lading will be held enforceable and valid.[12] In *The Bremen*, the U.S. Supreme Court held that "federal courts presumptively must enforce forum selection clauses in international transactions. Since *The Bremen*, the Court has consistently followed this rule and, in fact, has enforced every forum selection clause in an international contract that has come before it."[13] The U.S. Supreme Court has justified its holding "in the interests of international comity and out of deference to the integrity and proficiency of foreign courts."[14] The presumption of validity may be overcome by a clear demonstration that the clause is unreasonable under

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[12] *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997), citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-23, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). See also *Haynsworth v. The Corporation*, 121 F.3d 956, 961 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998).

[13] *Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998), citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-42, 115 S.Ct. 2322, 2330, 132 L.Ed.2d 462(1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528, 113 L.Ed.2d 622 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640, 105 S.Ct. 3346, 3361, 87 L.Ed.2d 444 (1985); *Scherk*, 417 U.S. at 519-20, 94 S.Ct. at 2457.

[14] *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

the circumstances of the case.[15] The burden of proving the clause is unreasonable under the circumstances is a heavy one, and may only be carried by showing:

> (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.[16]

The language of the disputed clause of the bill of lading provides: "The contract evidenced by this bill of lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the courts of any other country."[17]

Defendants argue that the Plaintiffs cannot overcome the strong presumption of validity of the

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[15] *Id.* at 35.

[16] *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998), citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

[17] Rec. Doc. 24, Exhibit 4.

forum-selection clause, and the motion to dismiss pursuant to Rule 12(b)(3) should be granted. The Court agrees.

Plaintiffs first allege Defendants' objection to venue is waived as untimely. A motion to dismiss for improper venue must be filed before or in a party's answer. However, the Defendants state in their answer that "there was insufficiency of service of process and/or jurisdiction over the defendants and that the defendants 'specifically plead any applicable bills of lading, contracts of carriage and/or charter parties in their entirety and the applicable law and terms incorporated therein.'"[18] Defendants further argue the defenses were properly plead and plaintiffs were told on other occasions that jurisdiction and venue were improper.[19]

The Court finds the Defendants reserved their right to raise the improper venue affirmative defense in their answer, the motion to dismiss was timely, and the right to raise it was not waived by the Defendants.

Plaintiffs next allege Defendants have already submitted to the jurisdiction of this Court by posting the Letter of Undertaking (LOU). Defendants argue that the LOU does not preclude them from asserting any other rights to which they would have been entitled, in particular when Clause 4 of the LOU expressly states that it: "reserve[es] on behalf of said

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[18] Rec. Doc. 38, p.2, quoting Rec. Doc. 6, p. 1 and 3.

[19] Defendants cite the Court's March 8, 2007 Scheduling Order, Rec. Doc. 14, p. 1: "Jurisdiction and venue are not established."

vessel, her owners and underwriters, all other defenses and limitations."[20] Defendants further note — preemptively to an argument by Plaintiffs that they do not intend to honor the LOU terms because they have not filed a corporate surety bond — that the parties are in contact regarding said surety bond, which was requested by Plaintiffs on May 7, 2007.

The Court finds the Defendants reserved their right to plead all affirmative defenses, including improper venue, in their answer and in the LOU. Further, since the basis for dismissal is Rule 12(b)(3), improper venue, and not Rule 12(b)(1), lack of subject matter jurisdiction, the Court need not rule on whether the Defendants submitted to jurisdiction through their Letter of Undertaking.

Plaintiffs next allege enforcement of the forum selection clause would cause a grave inconvenience and unfairness, effectively depriving Plaintiffs of a remedy.

Defendants argue that the Plaintiffs cannot meet their burden of proving that enforcing the forum selection clause would be unreasonable under the circumstances. In addition, Defendants argue Plaintiffs will not be deprived of their day in court because they have already filed suit in the High Court of Justice in London. The Court agrees.

"Fraud and overreaching must be specific to a forum selection clause in order to invalidate it... [a]

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[20] Rec. Doc. 38, citing to Exhibit A, the LOU, which the Court notes is not attached to the memorandum.

forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion."[21] Plaintiffs do not allege the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching.

The Court finds there is no evidence of fraud or overreaching in the incorporation of the forum selection clause into the agreement.

Plaintiffs argue that enforcing the agreement means they will, for all practical purposes, be deprived of their day in court because of the grave inconvenience or unfairness of the selected forum. Plaintiffs essentially argue that dismissal will create a *forum non conveniens*, as the witnesses are primarily in Louisiana, discovery has begun, and litigation in England will be so inconvenient and expensive that Plaintiffs' claims will effectively be extinguished. However, the Court notes that this case does not involve a local dispute between American companies, and the parties are sophisticated foreign companies in the business of the transportion of goods in international commerce. The Plaintiffs have filed suit in the High Court of Justice in London. Presumably any discovery already undertaken will be applicable in the English case, since the parties and claims are the same. Finally, "[i]ncreased cost and inconvenience are

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[21] *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998), citing *Scherk*, 417 U.S. at 519 n. 14, 94 S.Ct. at 2457 n. 14, emphasis in the original.

insufficient reasons to invalidate foreign forum-selection or arbitration clauses."[22]

The Court finds the Plaintiffs have not met their burden to establish that they will be deprived of their day in court.

Plaintiffs argue they will be deprived of a remedy, but they do not cite any fundamental unfairness of English law to substantiate this allegation. Although Plaintiffs allege no guarantee exists that the English High Court will correctly interpret the appropriate law (the Court notes that the English Court will be applying English Law), they offer only speculation, which is insufficient to carry their heavy burden.

> COGSA... is the "culmination of a multilateral effort" to establish such rules, an international scheme the very nature of which would be frustrated by permitting parties to opt out of it... Because the enforceability doctrine of *The Bremen* and *Scherk* is grounded in the special needs of parties contracting in international commerce, it would make little sense to apply it against a statute specifically designed to foster uniformity in international shipping agreements.[23]

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[22] *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 37, (5th Cir. 1997), citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

[23] *Haynsworth v. The Corporation*, 121 F.3d 956, 968-69 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998), quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-42, 115 S.Ct. 2322, 132 L.Ed.2d 462

Further, "England... [is] a forum that American courts repeatedly have recognized to be fair and impartial."[24] Plaintiffs, sophisticated businesses contracting in international commerce, do not carry their burden to establish any fundamental unfairness or the possibility of English Law being inappropriate for the purposes of a fair resolution to this case.

Plaintiffs argue that Ambraco did not negotiate the terms of the bill of lading, and so as a non-party it cannot be held to its terms. The Court disagrees. "Although a bill of lading is a contract between a shipper and carrier, there is ample precedent for binding a consignee to the bill of lading contract."[25] "A [f]orum-selection provision is not uncommon in bills of lading, and thus should have been anticipated by... a sophisticated international shipper/consignee well-

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(1995) and *Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth, Inc.*, 473 U.S. 614, 640, 105 S.Ct. 3346, 3361, 87 L.Ed.2d 444 (1985), citations omitted.

[24] *Haynsworth v. The Corporation*, 121 F.3d 956, 967 (5th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1513, 140 L.Ed.2d 666 (1998). The Court notes Haynsworth was a securities fraud case. But see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-23, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), where England was held as a proper forum in a maritime case; and *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997), dismissing a COGSA-governed claim in favor of a forum in England.

[25] Taisheng Intern. Ltd. V. Eagle Maritime Services, Inc., 2006 WL 846380, (S.D. Texas, March 30, 2006), citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Kanematsu USA, Inc., v. M/V Ocean Sunrise*, 2003 WL 21241790 (E.D.La.) 2003 A.M.C. 2200, not reported in F.Supp.2d.

versed in this type of transaction."[26] All the parties in this case are sophisticated international businesses, and cannot avoid enforcement of a common forum selection clause when there is ample precedent to the contrary.

Plaintiffs finally argue that enforcement of the forum selection clause would contravene strong public policy, claiming that a forum selection clause is null and void if it relieves the carrier of liability or lessens its liability as established by COGSA.[27] Plaintiffs cite Judge Fallon's decision in *Kanematsu*,[28] where a motion to dismiss was denied, to support their argument. However, in *Kanematsu*, the court cautioned that a plaintiff must meet "his burden to show that the application of the foreign law will deprive him of rights and protections afforded to him under the law of the United States COGSA."[29] The

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[26] *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 36, (5th Cir. 1997).

[27] 46 U.S.C. § 1303(8), since replaced by 46 U.S.C.A. § 30701, effective October 6, 2006: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter [this note], shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability." 46 U.S.C.A. § 30701.

[28] *Kanematsu USA, Inc., v. M/V Ocean Sunrise*, 2003 WL 21241790 (E.D.La.) 2003 A.M.C. 2200, not reported in F.Supp.2d.

[29] *Id.* at 3.

court examined affidavits from the attorneys representing both sides and determined that the Japanese forum would not apply the minimum protections afforded by law, since under Japanese law the plaintiff's claims under the bill of lading would lie solely against a party previously dismissed from the suit.[30] *Kanematsu* can be distinguished from the facts of this case, where Plaintiffs have made no such allegations of differences in English and United States law that would deprive them of a remedy or that would relieve or lessen the liability of the Defendants if the motion to dismiss is granted. Plaintiffs cite no specific differences in the law that would prejudice them and provide no affidavits to support their allegation. Further, as discussed above, there is ample U.S. Supreme Court precedent accepting England as a proper forum in cases where forum selection clauses were litigated in United States courts.

The Court finds that Plaintiffs have not carried their burden to demonstrate that enforcement of the forum selection clause would contravene any strong public policy.

IV. Conclusion

Having considered the complaint, the motion and memoranda, and applicable law, the Court finds the forum selection clause is valid and enforceable. Accordingly, **IT IS ORDERED** that the Motion to Dismiss for Improper Venue is **GRANTED**.

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[30] *Id.*

New Orleans, Louisiana this 24rd day of May, 2007.

/s/ Helen G. Berrigan
HELEN G. BERRIGAN
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed July 1, 2009]

No. 07-30727

AMBRACO INC; GREAT AMERICAN INSURANCE COMPANY	)
	)
Plaintiffs - Appellants	)
	)
v.	)
	)
BOSSCLIP B V, in personam; DOCKENDALE SHIPPING COMPANY LTD, in personam; FAITH SHIPPING COMPANY LTD, in personam	)
	)
Defendants - Appellees	)

Consolidated With
Case No. 07-31156

AMBRACO INC; GREAT AMERICAN INSURANCE COMPANY	)
	)
Plaintiffs - Appellants	)
	)
v.	)

CLIPPER FAITH MV, her engines, tackle, apparel, furniture, etc, in rem; BOSSCLIP B V, in personam; DOCKENDALE SHIPPING COMPANY LTD, in personam; FAITH SHIPPING COMPANY LTD, in personam

Defendants - Third Party Defendants - Appellees

v.

PACORINI HOLDING, LLC

Defendant - Third Party Plaintiff - Appellant

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before GARWOOD, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

REHG13 ECP

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX E

46 U.S.C. § 30701

This chapter codifies the Act of February 13, 1893 (ch. 105, 27 Stat. 445) (commonly known as the Harter Act). Changes are made to simplify, clarify, and modernize the language and style, but the intent is that these changes should not result in changes in substance.

A definition of "carrier" is added based on language appearing in various provisions of the Harter Act. The definition avoids the need to repeat in various sections of this chapter the list of persons to whom the requirements and restrictions of this chapter apply, and it ensures that the list of persons is consistent in the chapter.

Carriage of Goods by Sea Act

Act Apr. 16, 1936, ch. 229, 49 Stat. 1207, as amended by Pub. L. 97–31, § 12(146), Aug. 6, 1981, 95 Stat. 166, provided:

"That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act.

TITLE I

Section 1. When used in this Act—

(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term 'ship' means any vessel used for the carriage of goods by sea.

(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

RISKS

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage,

custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

RESPONSIBILITIES AND LIABILITIES

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: Provided, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled 'An Act relating to bills of lading in interstate and foreign commerce', approved August 29, 1916 (U.S.C., title 49, secs. 81–124), commonly known as the 'Pomerene Bills of Lading Act' [now chapter 801 of Title 49, Transportation].

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to

the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a

'shipped' bill of lading: Provided, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

RIGHTS AND IMMUNITIES

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from

unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or

passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without

compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

SURRENDER OF RIGHTS AND IMMUNITIES AND INCREASE OF RESPONSIBILITIES AND LIABILITIES

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

SPECIAL CONDITIONS

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and

immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: Provided, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: Provided, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

[AGREEMENT AS TO RESPONSIBILITY AND LIABILITY BEFORE LOADING OR AFTER DISCHARGE]

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

[RIGHTS AND LIABILITIES UNDER OTHER OBLIGATIONS]

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [former 46 App. U.S.C. 801 et seq., see Disposition Table preceding section 101 of this title], or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States [see chapter 305 of this title] or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

TITLE II

[DISCRIMINATION BETWEEN COMPETING SHIPPERS]

Section. 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended [former 46 App. U.S.C. 801 et seq., see Disposition Table preceding section 101 of this title].

[OMITTED]

Sec. 10. [Amended section 25 of the Interstate Commerce Act (former 49 U.S.C. 25).]

[WEIGHT OF BULK CARGO]

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

[RELATIONSHIP TO OTHER LAW]

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled 'An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property', approved February 13, 1893 [now this chapter], or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

[SCOPE OF ACT; "UNITED STATES"; "FOREIGN TRADE"]

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term 'United States' includes its districts, territories, and possessions: Provided, however, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act.

[As to proviso in second sentence that Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands, see Proc. No. 2695, set out under section 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.]

[SUSPENSION OF PROVISIONS BY PRESIDENT]

Sec. 14. Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. [As amended Pub. L. 97–31, § 12(146), Aug. 6, 1981, 95 Stat. 166.]

[EFFECTIVE DATE]

Sec. 15. This Act shall take effect ninety days after the date of its approval [April 16, 1936]; but nothing in this Act shall apply during a period not to exceed one

year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid.

[SHORT TITLE]

Sec. 16. This Act may be cited as the 'Carriage of Goods by Sea Act'.

APPENDIX F

LAW OFFICES
TERRIBERRY, CARROLL & YANCEY, L.L.P.
3100 ENERGY CENTRE
1100 POYDRAS STREET
NEW ORLEANS 70163-3100

TELEPHONE: (504) 523-6451
FACSIMILE: (504) 524-3257

WRITER'S DIRECT E-MAIL
cflozes@terriberry.com

February 17, 2006

Ambraco, Inc.
c/o Frank Courtenay, Esq.
400 Poydras Street, Suite 1540
New Orleans, Louisiana 70130

Re: M/V CLIPPER FAITH, Voyage 0603
Cabedelo, Brazil/NOLA
Ladings 603 CBNO 018 through 034 and RINO 001
Alleged damage to Bailer Twine
Our File: 34122/CFL

Gentlemen:

In consideration for your refraining from the arrest of CLIPPER FAITH and refraining from attaching any property belonging to the owner of said vessel in

connection with the captioned claimed cargo damage, we agree, on behalf of Assuranceforeningen Skuld, vessel lost or not lost, in or out of the jurisdiction:

1. To file or cause to be filed on your demand a corporate surety bond in the amount of TWO MILLION DOLLARS ($2,000,000), as security for your claimed damages in any suit that you may file in the United States District Court for the Eastern District of Louisiana, against CLIPPER FAITH, *in rem* and/or her owners *in personam* and to cause an appearance to be entered on behalf of the proper claimant of the vessel:

2. To cause the payment of any judgment that might be rendered in said civil action against CLIPPER FAITH *in rem* or her owners *in personam* up to and including the sum of TWO MILLION DOLLARS ($2,000.000), after appeal, if any, or to cause the payment of any settlement agreed upon, as approved by the undersigned Assuranceforeningen Skuld, up to and including the foregoing sum;

3. It is understood and agreed between the parties to this undertaking that the sum of TWO MILLION DOLLARS ($2,000,000), either by way of bond or under this obligation, can be reduced by the agreement of all parties, or failing said agreement, by order of the Court during the pendency of this obligation.

4. It is the intention of this undertaking and guarantee that it be substitute security in lieu of a corporate surety bond, as though CLIPPER FAITH had been arrested or attached under process issued by the United States District Court for the Eastern District of Louisiana, and had been released upon the filing of a corporate surety bond, reserving on behalf of said vessel, her owners and underwriters, all other defenses and limitations, including but not limited to denial of all liability for the alleged cargo damage, as well as her owners' and underwriters' right to petition for exoneration from and/or limitation of liability, and/or the right to seek arbitration.

5. In the event the bond referred to under sub-paragraph (1), *supra*, is filed, the undersigned Association shall have no further obligation under sub-paragraph (2), *supra*.

It is understood and agreed that the signing of this letter by Terriberry, Carroll & Yancey, L.L.P., shall not be binding upon them nor upon any of their partners, but is binding only upon Assuranceforeningen Skuld.

Yours very truly,

For and on behalf of
Assuranceforeningen SKULD (Gjensidig)

BY: Terriberry, Carroll & Yancey, L.L.P.,

BY: /s/
Charles F. Lozes
As per telefax authority received
February 17, 2006

CFL/lgr

APPENDIX G

EXHIBIT C

Affidavit of M A Lloyd
For and on behalf of the Plaintiff
Dated 27TH June 2007
Exhibit "MAL1"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO: 06-CV-09966
SECTION "C"

BETWEEN:

(1) AMBRACO INC
(2) GREAT AMERICAN INSURANCE COMPANY

Plaintiffs

-and-

(1) M.V. "CLIPPER FAITH" HER ENGINES, TACKLE, APPAREL, FURNITURE, ETC *IN REM*

(2) BOSSCLIP B.V, DOCKENDALE SHIPPING CO. LTD AND FAITH SHIPPING CO. LTD *IN PERSONAM*

Defendants

AFFIDAVIT OF MARK ANDREW LLOYD ON ISSUES OF ENGLISH LAW

I, MARK ANDREW LLOYD of Birchin Court, 20 Birchin Lane, London EC3V 9ER **MAKE OATH AND SAY** as follows:

Qualifications and Experience

1. I am a solicitor of the Supreme Court of Judicature and a Partner in the firm of Waltons & Morse LLP a limited liability partnership of solicitors whose offices are situate at the above address.

2. For 15 years I have been concerned with all aspects of marine litigation representing both hull and machinery and cargo interests together with Lloyds of London and company underwriters. I entered the English legal profession in 1992.

3. I joined the firm of Sinclair Roche & Temperley in September 1992 and was admitted as a Solicitor of the Supreme Court following successful completion of my Articles of Clerkship in September 1994. I joined Waltons & Morse as a Solicitor in May 1997 and became a partner in July 2001.

4. The firm of Waltons & Morse was founded in 1848 and since that time has specialised in shipping, transit and insurance law. These are the main core

business activities of the firm which is recognised as one of the leading specialist shipping, transport and insurance practices based in the City of London. The latest edition, 2007, of Chambers & Partners Directory of the Legal Profession (**pages 1 and 2**) notes Waltons & Morse as one of the leading firms in London and the United Kingdom relating to transport and shipping related matters. The firm was also the recipient of the Lloyds List Shipping Lawyer of the Year 2007 award earlier this year (**page 3**).

5. The facts and matters deposed to herein are within my direct knowledge and they are true. Where facts and matters not within my direct knowledge, they are true to the best of my information, knowledge and belief and are based upon the source indicated within this Affidavit. Where I have stated an opinion, that opinion represents my true and honest opinion based on both my experience and legal research.

6. I offer this affidavit to assist the United States District Court with issues of English law now raised in this matter, particularly in relation to the Plaintiffs' Motion to Amend or Alter Judgment or Alternatively For New Trial.

7. Reference in this Affidavit to page numbers are references to page numbers of the attached Exhibit "MAL 1". I do not propose to exhibit to this Affidavit copies of every authority referred to, save where it is likely that these are not readily available and accessible to the United States District Court.

Questions addressed in this Affidavit

8. I have been asked by Mr Francis A Courtenay Jr. of Preis & Roy, Attorneys and Attorneys at law of New Orleans, Louisiana (the Plaintiffs' attorneys) to provide a legal opinion, based upon the current status of English law, upon points raised in the Order and Reasons of US District Judge Helen G. Berrigan dated 24th May 2007 and in the Plaintiffs' attorneys' Motion to Amend or Alter Judgment, or alternatively for a new trial dated 6th June 2007.

9. In particular, I have been asked to address the current position under English law regarding the interpretation of the identity of Carrier Clause upon the Bills of Lading numbered CPERC0603CBNO018 through to CPERC0603CBN0034 (inclusive) issued by Bossclip B.V and all dated 20th December 2005 (**example at pages 4 and 5**) (hereinafter referred to as the Bills of Lading). I have also been asked to address the issue of the *in rem* and *in personam* jurisdiction of the English Courts.

Materials studied for this Affidavit

10. I have read the verified Complaint of the Plaintiffs filed on 14th November 2006 together with the Supplemental and Amended Complaint of the Plaintiffs dated 7th March 2007, the Defendants' Motion to Dismiss Complaint and supporting Memorandum dated 26th April 2007, the Order and Reasons (referred to above) and the Plaintiffs' Motion to Amend or Alter Judgment or alternatively for a new trial together with supporting Memorandum. I have

also particularly considered the terms of the Bills of Lading and have conducted my own research upon the reported case authorities and the legal authorities as specifically referred to below.

The status of the matter

11. Following District Judge Berrigan's Order and Reasons the Plaintiffs submitted a Motion and Memorandum in support to alter or amend the Judgment or alternatively seek a new trial. The time limit position was also protected by the issue of an in personam Claim Form before the English High Court, Queens Bench Division, Commercial Court on 29th March 2007 (**pages 6 to 8**). This Claim Form is due for service on or before 28th July 2007 albeit my instructions are to seek an extension of time for service out of the jurisdiction pending determination/progress of the matter before the United States District Court. The English proceedings have not therefore, at this stage, been served and are simply pending with time having been interrupted by issue of the Claim Form.

12. In the English action all four Defendants are companies incorporated and resident outside the English jurisdiction. The Claim Form has been endorsed by the English Courts "*not for service out of the jurisdiction.*"

13. This endorsement upon the Claim Form means that permission of the Court has to be obtained to serve the proceedings out of the jurisdiction upon the four Defendants. Permission to effect

service out of the jurisdiction is sought by way of an application to the Court.

14. English court proceedings are governed by the Civil Procedure Rules ("the CPR") which confirm that the issuance of a Claim Form protects the position with regard to any limitation of time issues. However, proceedings are only deemed active between the parties once those proceedings have been served by the Plaintiffs upon the relevant Defendant.

Application/relevance of English law

15. The Bills of Lading are on a Bossclip B.V Netherlands standard form and all cover shipment between the port of loading at Cabedelo, Brazil, and the port of discharge of New Orleans, USA. All of the Bills of Lading are on identical terms save as to the quantity of cargo covered by each Bill. The Bills of Lading state on their reverse at clause 2 (headed Jurisdiction) that "*the contract evidenced by this Bill of Lading shall be governed by English law and any disputes thereunder shall be determined in England by the High Court of Justice in London according to English law to the exclusion of the courts of any other country.*"

16. On the basis that English law would be deemed to be applicable, I now propose to deal with the interpretation of, in particular, the identity of carrier clause and the stance that would be adopted by the English Courts.

Terms of the Bill of Lading

17. I consider that it would be useful to highlight the particularly relevant terms of the Bill of Lading (both upon the face and reverse of that document). The copy I have is not perfectly clear and the writing is somewhat small but on the face (referred to on the back as page 2) of the Bills it states at the foot of the Bills of Lading *"IN ACCEPTING THIS BILL OF LADING. The Merchant agrees to be bound by all the stipulation, exceptions, terms and conditions on the face and back hereof whether typed, stamped or printed, as fully as if signed by the Merchant, any local custom or dispute to the contrary notwithstanding and agrees that all agreements engagement for and in connection with the carriage of the goods is superceded by this Bill of Lading". The foot of the Bills of Lading then states "IN WITNESS WHEREOF THE MASTER OR AGENT HAS SIGNED THREE BILLS OF LADING ALL OF THE SAME.... DATE, ONE OF WHICH BEING ACCOMPLISHED THE OTHERS TO STAND VOID. FOR AND ON BEHALF OF THE MASTER. SHIPPED ON BOARD. DATE AT CABEDELO 20/12/2005".*

18. The Bills of Lading are all signed by "*Heytor Cusmao CGM & Rep. LTDA as agents only for and on behalf of Master Mohammed Pedder*"

Terms on the reverse of the Bills of Lading (page 5)

"1. DEFINITIONS"

19. *a. "Carrier" means the carrier as stipulated on page 2 of this Bill of Lading, and insofar as carriage by sea is concerned, the registered owner of the vessel".*

d. "Merchant" includes the owner, shipper, consignor, consignee and receiver of the goods and the holder of the Bill of Lading, any person having a present or future interest in the goods or any person acting on behalf of any of the above"

5. CLAUSE PARAMOUNT

.....

d. If the carnage is to or from the US the Carriage of Goods by Sea Act 1936 of the United States shall apply (whether the goods are stowed on or under deck).... Nothing herein shall be deemed to be a surrender by the carrier of any of its rights or immunities or any increase of its responsibility or liabilities under said Act If any term of this Bills of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further".

English case law

20. The interpretation of identity of carrier clauses for the purposes of establishing the, party responsible upon a contract evidenced by the terms of a Bill of Lading, has been the subject of

considerable recent judicial discussion and decision in England.

21. There is a line of recent case authority dealing with the issue. The most recent authorities are ***Fetim B.V & Others -v- Oceanspeed Shipping Limited*** **(The "FLECHA") [1991] 1 Lloyds Rep.612; MB *Pyramid Sound M.V -v- Briese Schiffahrts GmbH* (The "INES") [1995] 2 Lloyds Rep.144; and *Sunrise Maritime Inc. -v- Uvisco Limited* (The "HECTOR") [1998] 2 Lloyds Rep.287.**

22. These decisions, together with older authorities upon the point have very recently been summarised in a House of Lords decision. The House of Lords is the highest level court in England and Wales and its decisions bind lower courts on the same point of law. Therefore a House of Lords decision can be taken to set out the current English law position. This case is ***Homburg Houtimport B.V -v- Agrosin Private Limited & Others*** **[The "STARSIN") [2004] AC715 (pages 9 to 95).**

23. I propose to deal with the issues as set out in the **"STARSIN"** case regarding the identity of carrier clause below but consider it is useful to summarise, by way of background, a number of guiding principles of English law (which were also discussed in the **"STARSIN"** at Court of Appeal level) which have governed the English law approach to construction of contractual terms in recent years.

24. In particular it is a guiding principle under English law that where the parties utilise a written standard form of contract to which additional written words or clauses are added and prima facie the actual words added have greater effect than the printed clauses; Chitty on Contracts, 29th Edition, 2004, volume 1 paragraph 12-070 **(pages 96 and 97)** and also ***Gold -v- Patman & Fotheringham Limited [1958]*** **1 W.L.R. 697**.

25. In ***Elderslie Steamship Co. Ltd -v- Borthwick*** **[1905] AC93** Lord Halsbury LC, in the House of Lords, stated *"one rule of construction which must prevail is that you must give effect to every part of a document if you can - you must read it as a whole"*.

26. Whilst such principles of construction are not slavishly followed by the English Courts they can and do act as a starting point for the interpretation of contractual terms, see Devlin J. in ***Charles -v- Isbrindpsen - Moller Co. Inc*** **[1951] 1 KB 240** where he stated *"A rule of construction cannot be more than a guide to enable the Court to arrive at the true meaning of the parties."*

27. Applying these principles to the current case I therefore consider it clear that the English Courts would seek to construe the whole of the Bill of Lading document to establish the intent of the parties, particularly with reference to the identity of the carrier.

The "STARSIN"

28. The **"STARSIN"** case involved the carriage of numerous parcels of timber and plywood on board the vessel **"STARSIN"** from Kuching, Port Klang and Belawan to Antwerp and Avonmouth. Upon arrival the cargo was noted to be damaged due to condensation and an issue for determination by the Court was who was the contractual carrier under the terms of the various Bills of Lading.

29. The Bills of Lading were in a liner Bills of Lading form on the standard form of the time charterers - Continental Pacific Shipping ("CPS"). The Bills of Lading were also signed upon their faces (albeit in slightly different variants on the different Bills of Lading) with stamps of various agency companies over/above typed words stating as "*agents for Continental Pacific Shipping as carrier*".

30. The signature clause appeared to identify the time charterers as the contractual carrier. This however conflicted with the identity of the carrier clause upon the reverse of the Bills of Lading which stated (in its material part): "*the contract evidenced by this Bill of Lading is between the Merchant and the Owners of the vessel named herein or substitute*". On the reverse of the Bill there was also an additional demise clause (clause 35) stating (again in material parts): "*if the ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued... this Bill*

of Lading should take effect only as a contract of carriage with the owner or demised charterer..."

31. The "**STARSIN**" House of Lords Judgment runs to almost 90 pages in total and whilst much of the decision deals with other issues in that case I consider it useful to exhibit the full House of Lords Judgment (**pages 9 to 95**).

House of Lords Judgment

32. At first instance, Mr Justice Coleman held that the Bills of Lading were to be considered charterers Bills and that charterers (CPS) were to be considered the contractual carrier. The charterers appealed to the Court of Appeal and the Court of Appeal (Sir Andrew Morritt V-C, Lord Justice Chadwick and Lord Justice Rix (dissenting)) allowed the appeal and held that Bills of Lading were ship owners' Bills and that the ship owner was the contractual carrier. The House of Lords (consisting of a panel of Lord Bingham, Lord Steyn, Lord Hoffman, Lord Hobhouse and Lord Millett) allowed the ship owners' appeal and held that (save in respect of one cargo interest) the Bills of Lading were to be considered charterers Bills and the charterers were to be deemed the contractual carriers.

33. The difference in that case to the case with which we are concerned is that the Bills of Lading were on the charterers' standard form and were signed clearly on the face of the Bill of Lading as agent for CPS as "**the carrier**" (my emphasis). In the Bossclip B.V Bills of Lading

with which we are concerned, despite the assertion in the Defendants' Motion to Dismiss (at page 3 of the Motion) there is nothing upon the face or the reverse of the Bill of Lading which specifically identifies Bossclip B.V. as carrier. The Bills of Lading are signed for and on behalf of the Master.

34. As referred to in the "**STARSIN**" House of Lords decision, cases such as the **Rewla [1991] 2 Lloyds Rep. 325** confirm that signature by and on behalf of the Master of the vessel is a strong, albeit not conclusive, pointer towards a Bill of Lading being an owners' Bill - Lord Bingham's Judgment at paragraph 8 on page 736 (**see page 30**).

35. The House of Lords clearly preferred the dissenting judgment of Lord Justice Rix in the Court of Appeal and the first instance judgment of Justice Coleman. Indeed Lord Bingham refers at page 738 and 739 of the House of Lords Judgment (**page 32 and 33**) to the academic views upon the issue, preferring the construction of Lord Justice Rix Lord Bingham also refers on page 739 to the market practice (**page 33**) under the ICC Uniform Customs and Practice for Documentary Credits as to interpretation of Bills of Lading and the identity of carriers. Se also Lord Hoffman's Judgment at paragraph 82 at page 756 of the Judgment (**pages 50 and 51**)

36. In light of the decision of the House of Lords in the "**STARSIN**" matter and the commentaries referred to in that decision, I consider it would

be the case that were the Bossclip B.V Bills of Lading to be construed by an English Court, then the form of signature on the face of the Bill and the identity of carrier clause on the reverse of the Bill would be construed so as to determine that this was a Bill of Lading evidencing a contract which was intended to be between the registered owner of the vessel i.e Faith Shipping Co Ltd and the cargo interests. There is nothing upon the face of the Bill (save that it is on a Bossclip B.V standard form) which conflicts with or is contrary to this interpretation.

37. It therefore appears to be the case that the Defendants contend before the American Courts that Bossclip B.V are the carrier and security has been provided by way of a letter of undertaking on behalf of the Defendants. There is however a real risk that the English proceedings, if they were to be pursued (in the event that the Order of District Judge Berrigan remained in place), would hold that the Plaintiffs would not be able to pursue a claim against Bossclip B.V in contract.

English Court jurisdiction *in personam* and *in rem*

38. The Claim Form issued before the English Courts is an *in personam* Claim Form. It was clear at a the time of issue and from the vessels current movements history obtained from the Lloyds Seasearcher website today (pages 98 to 108) that the vessel, between November 2001 and today's date did not (save on 1 occasion in

March 2006 when she visited Liverpool, and 1 occasion in September 2002 when she visited Leith in Scotland) and does not trade to ports within the jurisdiction of the UK to form the basis for serving an *in rem* Claim Form or arresting the vessel. The English Courts do have *in rem* admiralty jurisdiction (under the Supreme Court Act 981 section 20(1) and (2)) and under CPR Part 61.

39. The English Courts considered the nature of the courts *in personam* and *in rem* jurisdiction in the Admiralty/High Court in The "INDIAN GRACE", a matter which, again, was considered all the way to the House of Lords (**[1998] 1 Lloyds Law Rep. 1**).

40. Accordingly, the English proceedings which were commenced are solely *in personam*. There was no basis to commence a pure *in rem* claim before the English Courts as a cargo damage claim does not give rise to a maritime lien under English law but merely a statutory right *in rem* and there was no res within, the jurisdiction.

41. In this matter there is no security provided by the defendants which would respond to a judgment of the English High Court and there are no *in rem* proceedings before the English court. Accordingly, in circumstances where the vessel is not and would not be within the jurisdiction, were the matter to be determined before the English Courts there is a high probability that, in the absence of the provision of security, any judgment against the defendant may not prove capable of enforcement.

Alternatively, any steps that may be necessary to enforce against assets outside the English jurisdiction may prove costly and incur substantial delay.

Conclusions

42. In my opinion, therefore, the English Courts would construe the Bills of lading as being ship owners' Bill representing a contract between the ship owner and cargo interests. Any claim in contract would therefore need to be pursued against the registered owners of the vessel. It is also my opinion that the English Courts would not find that Bossclip B.V were the contractual carriers and cargo interests/plaintiffs would not have a claim against Bossclip B.V in the English High Court. This is of course contrary to the apparent position before the US District Court where Bossclip B.V would be the carrier as well as the ship owner under the US Carriage of Goods by Sea Act 1936, as I understand US law.

43. If the English proceedings were to proceed, these would be purely *in personam* needing service to be effected outside the jurisdiction. If the Order and Reasons stand the Plaintiffs would also lose any *in rem* action and any security provided by or on behalf of the Defendants. In the absence of any security covering judgment in the English proceedings from ship owners/Defendants, then there is a real risk that in the event that the Plaintiffs are successful in their claim that there would be no assets against which to enforce any judgment.

The English proceedings are *in personam* proceedings and there is no separate action against the res/the vessel itself. So far as I am aware the Defendants have also not, to date, confirmed if they will appear (acknowledge service) in the English proceedings.

Signed /s/_____

Mark Andrew Lloyd

Dated 27th June 2007

Sworn this 27th day of June 2007 at Holmes Hardingham, 22-23 Great Tower street, London EC3R 5HE

/s/

Before me Andrew Messent , a Solicitor

Affidavit of M A Lloyd
For and on behalf of the Plaintiffs
Dated 27th June 2007
Exhibit "MAL1"

CIVIL ACTION NO: 06-CV-09966

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SECTION "C"

BETWEEN:

(1) **AMBRACO INCO**
(2) **GREAT AMERICAN INSURANCE COMPANY**

Plaintiffs

-and-

(1) **M.V. "CLIPPER FAITH" HER ENGINES, TACKLE, APPAREL, FURNITURE, ETC *IN REM***

(2) **BOSSCLIP B. V, DOCKENDALE SHIPPING CO. LTD AND FAITH SHIPPING CO. LTD *IN PERSONAM***

Defendants

AFFIDAVIT OF MARK ANDREW LLOYD ON ISSUES OF ENGLISH LAW

Waltons & Morse LLP
Birchin Court
20 Birchin Lane
London EC3V 9ER

Tel: 020 7623 4255
Fax: 020 7626 4153
Ref: MAL/10232/1

APPENDIX H

Bossclip B.V., Netherlands
Bill of Lading

[See fold-out exhibit, next 2 pages]

Bossclip B.V., Netherlands

SHIPPER

Cia Azul do Brasil - COSEBRA
Alfredo Escalante, 99
18560-970 - Santa Rita/PB, Brasil

B/L NUMBER: CPERC0603CBNO027

EXPORT REFERENCES

CONSIGNEE

Anthrace Inc., P.O Box 506
Highway 61 151 South - Dubuque
Iowa - 52004-7006 - USA

FORWARDING AGENT - REFERENCES

NOTIFY PARTY

M.G.Meier & Co. Inc.,
Stolle Building, 442 Canal Street,
New Orleans, LA - 70130 - USA

ORIGINAL

THE RESPONSIBILITY OF SHIPOWNERS CEASES AT PORT OF DISCHARGE

PLACE OF RECEIPT

VESSEL / VOYAGE / FLAG
CAPE FAITH 0603

PORT OF LOADING
CABEDELO, BRAZIL

FINAL DESTINATION

PORT OF DISCHARGE
NEW ORLEANS, U.S.A.

PLACE OF DELIVERY

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NUMBER OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENTS
Emid/Cedro/Fonte/Colonial 9M 40 Lts	60	Pallets config. 3.000 Rolls of Bales Twine NCM 5607.21.00 "CLEAN ON BOARD" "DIRECT TO PEORIA BARGE 2"	55425,00 KG NET WEIGHT 54432,00 KG	

REVENUE TONS	RATE	PER	PREPAID	COLLECT
		FLT		

FREIGHT AS PER AGREEMENT

BEST AVAILABLE COPY

Cia. Sisal do Brasil COSIBRA

Assinatura

Nome legível

Data e local

Nome legível

Assinatura

APPENDIX I

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
ROYAL COURTS OF JUSTICE

	for court use only
Claim No.	2007 Folio 382
Issue Date	20 March 2007

[SEAL]

NOT FOR SERVICE OUT
OF THE JURISDICTION

CLAIM FORM

Claimant(s)
(1) AMBRACO INC (a company incorporated under the laws of The United States of America whose principal place of business is situate at PO Box 506, Highway 61-161, South Dubuque, Iowa 52004-0506, The United States of America)

(2) GREAT AMERICAN INSURANCE COMPANY OF NEW YORK (a company incorporated under the laws of The United States of America in the state of New York, whose principal place of business is situate at

125 Park Avenue, 14th Floor, New York NY 10017, The United States of America)

Defendant(s)
(1) BOSSCLIP B.V (a company incorporated under the laws of The Netherlands whose principal place of business is situate at Wilhelminaplein 28, 3072 DE Rotterdam [Kaart] Rotterdam, Zuid Holland-The Netherlands)

(2) FAITH SHIPPING COMPANY LIMITED (a company incorporated under the laws of The Bahamas whose principal place of business is situate at Third Floor, Dockendale House, West Bay Street, PO Box N303310455, Nassau, The Bahamas)

(3) DOCKENDALE SHIPPING CO. LTD. (a company incorporated under the laws of The Bahamas (whose principal place of business is situate at Third Floor, Dockendale House, West Bay Street PO Box N303310455, Nassau, The Bahamas)

(4) PACORINI HOLDING LLC (previously known as PACORINI USA INC) (a company incorporated under the laws of The United States of American whose principal place of business is situate at #1 Albo street, New Orleans, Louisiana 70217, The United States of America)

Name and address of Defendant receiving this claim form

Amount claimed	tba
Court fee	£1,300.00
Solicitor's costs	tba
Total amount	tba

Does or will your claim include any issues under the Human Rights Act 1998? ☐ Yes ☒ No

Brief details of claim

The First and/or Second Claimants' claim, of not more than £250,000, as owners and/or subrogated cargo underwriters, is for loss and/or damage to a consignment of bales of Baler twine (the "cargo") shipped on board the First and/or Second and/or Third Defendants' vessel M.V. "CLIPPER FAITH" and carried under Bills of Lading CPRC0603CBNO018-CPERC0603CBNO034 (inclusive) and CPERC0604RINO001 (together the "Bills of Lading") such consignment being lost and/or damaged during transit between Cabedelos, Brasil and delivery to the consignees on river barges in the port of New Orleans, Louisiana in The United States of America in or about the months of December 2006 to April 2006 (inclusive) as a result of the First and/or Second and/or Third and/or Fourth Defendants breach of oral and/or written contracts as evidenced by the Bills of Lading and/or breach of duty of care and/or breach of duty in negligence and/or breach of duty in bailment in or about the custody, care, carriage, loading, unloading, handling, storage, discharge and/or stowage and securing of the cargo.

The First and/or Second Claimants also claim interest as such rates and for such periods as the Court deems appropriate pursuant to Section 35(A) of the Supreme Court Act 1981.

Particulars of claims *XXXXXXX (will follow if an acknowledgment of service is filed that indicates an intention to defend the claim)

Statement of Truth

*(I believe) XXXXXXX that the facts stated in this claim form *XXXXXXXXXXXXXXXXX are true.
*I am duly authorised by the claimant to sign this statement
Full name MARK ANDREW LLOYD

Name of *(claimant) ('s solicitor's firm)
WALTONS & MORSE

signed /s/ position or office held PARTNER

*(CLAIMANT) ('s solicitor) /s/ (if signing on behalf of firm, company or corporation)

**delete as appropriate*

Waltons & Morse
Birchin Court
20 Birchin Lane
London
EC3V 9ER
CTY 1065 London
Tel: 020 7623 4255
Fax: 020 7626 4153
Ref: MAL/10232/1

Claimant's or solicitor's address to which documents or payments should be sent if different from overleaf including (if appropriate) details of DX, fax or e-mail.

APPENDIX J

Winter Scott
Solicitors

St Olave's House
Ironmonger Lane
London EC2V 8EY
Telephone: + 44 (0)20 7367 8989
Fax: + 44 (0)20 7726 2371

E-mail: firstinitialsurname@winterscott.co.uk

FAX TRANSMISSION

DATE:	7 August 2009
TO:	7626 4153 Waltons & Morse Mark Lloyd Esq., ref: MAL/10232/1
FROM:	James King
OUR REF:	JCK/hm/85/24
NO. OF PAGES:	1

CONFIDENTIALITY NOTICE: This facsimile is intended only for the addressee. It may contain privileged and/or confidential information. If you are not the intended recipient please inform us on the above telephone number immediately and do not disclose the contents or take copies.

Re: "CLIPPER FAITH"

We thank you for your fax of 29 July.
We confirm that we are Instructed on behalf of Bossclip B.V. only (and not the other defendants named in the Claim Form), and that we are authorised to accept service of the Claim Form on their behalf only.

In the meantime, we should be grateful if you would provide us with copies of all documents (including your witness statements) filed at Court to obtain the various time extensions.

Yours faithfully

/s/
WINTER SCOTT

Partners: Glenn Winter Ken Scott Michael Ellis Damien Wilkes Tim Houghton James King Graeme Lloyd
Associates: Angus Jamieson
Regulated by the Solicitors Regulation Authority

VAT No GB 819417416